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IN THE

Supreme Court of the United States

October Term, 1959.

No. 426

JAMES H. MORRISON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA.

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October Term, 1959.

No. .....

JAMES H. MORRISON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA.

To the Honorable the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

James H. Morrison, by his counsel, David H. Caplow, respectfully petitions for a Writ of Certiorari to review a decision of the District Court of Appeal, Second Appellate District, State of California, 168 A. C. A. 298, 335 P. 2d 1022, rendered on February 26, 1959, which affirmed the judgment, and denial of Motion for New Trial, of the Superior Court of the State of California, in and for the County of Los Angeles.

A Petition for Rehearing was timely filed in said District Court of Appeal on March 13, 1959, which was denied on March 17, 1959. A Petition for Hearing was timely filed in the Supreme Court of the State of California on April 7, 1959, which was denied on April 22, 1959.

A.

STATEMENT OF THE CASE.

On July 3, 1955, in Rawlins, Wyoming, John T. Collins, secretary of Stadia Oil and Uranium Corporation, during a conversation with petitioner and one, Bernard Livingston, a securities salesman, discussed the Corporation's proposed expansion and development plans and aroused petitioner's desire to obtain some of its stock, but he was advised that none was available. On July 8, 1955, Collins telephoned petitioner that he had found a stockholder with 9,850 shares of stock available who would offer them at $1.00 per share; petitioner accepted the offer and told Collins his check for the stock was being mailed immediately, and received Collins' assurance that petitioner was the owner of the stock therewith. On July 9, 1955, Collins telephoned him to acknowledge receipt of the check, again confirming the petitioner's ownership of the stock, and stating that the transfer thereof to petitioner would be made as quickly as possible. Exhibit 38, a check, dated July 14, 1955, in the amount of $9,850.00, payable to John T. Collins, drawn on and paid from petitioner's account; Exhibit T, a certificate for 10,000 shares of Stadia stock, from which C. A. Upson, holder of record, assigned 9,850 shares to petitioner through the agency of John T. Collins, are evidence of the foregoing transaction.

On five occasions thereafter, petitioner bought additional Stadia stock from Austin B. Smith Brokerage Company, Salt Lake City, Utah, issuing his checks to that concern as follows: Exhibit No. 39, dated July 18, 1955, for $17,800.00; Exhibit 40, dated July 31, 1955, for $4,700.00; Exhibit 41, dated August 20, 1955, for $4,000.00; Exhibit 42, dated August 20, 1955, for $18,

200.00; and Exhibit 43, dated September 13, 1955, for $1,100.00. In each instance, upon delivering his check to Smith, he received a confirmation order bearing thereon the inscription that, as principal, Smith sold the stock for his own account, to petitioner, the confirmation orders being received by him in the same sequence, in which the checks were tendered, as follows: Exhibit 44, for 17,800 shares; Exhibit 45, for 4,700 shares; Ex. 46, for 4,000 shares; Exhibit 47, for 18,200 shares; and Exhibit 48, for 1,100 shares. All of the foregoing evidence was voluntarily made available to the district attorney's office, by petitioner, on November 30, 1955.

The record clearly shows that petitioner bought and sold the Stadia Oil and Uranium Corporation stock for himself, and for his own account, and that, at no time was he an incorporator, officer, director, employee of, or agent or issuer or underwriter for Stadia Corporation; at no time was he other than a shareholder of said corporation and his ownership of the Securities was later admitted by the prosecution. Such admission was made in Respondent's Brief as well as in the opinion by the District Court of Appeal. Indeed, the record discloses that the only stock involved, upon which this prosecution was based, was the stock of Stadia Oil and Uranium Corporation. Petitioner was charged with selling said stock as follows:

Count I	George Neikrug	250 Shares
Count III	W. John Pangman	1,000 Shares
Count V	Stanley Marlowe	2,100 Shares
Count VII	Ada Bell	500 Shares
Count VIII	Anne Pratt	1,500 Shares
Count X	Taylor Holmes	500 Shares
	Total	5,850 Shares

On December 12, 1956, just 12 days after a jury, in the United States District Court, Salt Lake City, Utah, had returned a verdict against the complaining witnesses, as plaintiffs, and in favor of petitioner, on substantially the same grounds charged in the case at bar, the district attorney, of Los Angeles County, had petitioner arrested on a Complaint Felony, Case No. 135211, Municipal Court, Los Angeles Judicial District, State of California, alleging violation of Section 26104(a), Corporations Code, State of California, a typical count of which follows:

> "That on or about.....day of....., 1955, at and in the County of Los Angeles, State of California, the crime of Violation of Section 26104(a), Corporations Code, a felony was committed by James H. Morrison, who, at the time and place last aforesaid, did willingly, unlawfully, feloniously and knowingly engage in the business of buying and selling, offering for sale, and negotiating for the sale of securities and purchasing securities with the purpose of reselling them to the public as defined in Section 25006 of the Corporations Code, in that the defendant did on or about said date sell and offer for sale and caused to be sold, for value, to wit.....Dollars ($.....), to John Doe, a security, to wit, shares of stock in a company known as and called Stadia Oil and Uranium Corporation, a corporation, organized under the laws of the State of Nevada, for profit, without first having applied for and secured from the Commissioner of Corporations of the State of California, a license so to do;"

and violation of Section 487(1), Penal Code, State of California; thereafter, he was released on bail.

On December 17, 1956, petitioner filed a Demurrer to Complaint [Clk. Tr. pp. 12 to 23] in Case No. 135211, on the grounds that:

". . . the alleged facts therein stated do not constitute a public offense . . ." and that

". . . the Corporate Securities Act of California does not require an individual to secure a broker's license before selling his own securities and to do so would b an unwarranted, illegal and unconstitutional violation of defendant's rights."

On January 3, 1957, the court dismissed the Demurrer, over petitioner's objection, without ruling upon it.

On January 21, 1957, petitioner was arraigned in the Superior Court, State of California, County of Los Angeles, and was served with an Information [Clk. Tr. pp. 1 to 11] in Case No. 187 290, a typical count of which follows:

"The said JAMES H. MORRISON is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of VIOLATION OF SECTION 26104(a), CORPORATIONS CODE, a felony, committed as follows: That the said JAMES H. MORRISON on or about ..... day of....., 1955, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously, and knowlingly, engage in the business of buying and selling, offering for sale, and negotiating for the sale of securities and purchasing securities with the purpose of reselling them to the public as defined in Section 25006 of the Corporations Code, in that the defendant did on or about said date sell and offer for sale and cause to be sold, for value, to wit, ... Dollars ($.....), to John Doe, a se-

> curity, to wit, shares of stock in a company known as and called Stadia Oil and Uranium Corporation, a corporation, organized under the laws of the State of Nevada, for profit, without first having applied for and secured from the Commissioner of Corporations of the State of California, a license so to do."

Therewith, he gave notice that he was entering his Motion under Section 995, Penal Code, to dismiss the Information, and filed on February 15, 1957, a Memorandum of Points and Authorities in Support of Motion under Section 995, Penal Code [Clk. Tr. p. 24], filing a Supplemental Memorandum of Points and Authorities on February 28, 1957. On February 28, 1957, the Motion Under Section 995 was denied.

On March 8, 1957, petitioner filed a Demurrer to the Information [Clk. Tr. pp. 27 to 41] on the grounds that:

> ". . . the Information does not state a public offense; and, because it does not state a public offense, the defendant's inalienable rights, guaranteed under the Constitutions of the United States and the State of California, will be violated by compelling defendant to submit to a trial under such defective information;"

which was overruled on March 11, 1957. Thereafter, petitioner filed a Petition for Writ of Prohibition on March 15, 1957, in the District Court of Appeal, Second Appellate District, State of California, which was denied on April 10, 1957.

On July 8, 1957, petitioner was made to stand trial and on July 23, 1957, was acquitted, by the jury, of violation of Section 487(1), Penal Code, and one count of violation of Section 26104(a), Corporations Code [Clk.

Tr. pp. 71 to 75, but was found guilty on the remaining counts of alleged violation of Section 26104(a), Corporations Code.

Petitioner filed Points and Authorities in support of his Motion to Dismiss [Clk. Tr. pp. 44 to 55; he also filed a Motion for New Trial [Clk. Tr. pp. 137 to 173], on August 22, 1957. His Motions were denied and petitioner was sentenced on August 30, 1957; he filed his Notice of Appeal therewith.

Petitioner filed his Opening Brief, in the District Court of Appeal, Second Appellate District, State of California, on April 10, 1958; Respondent's Brief was filed therein on July 30, 1958, and Petitioner's Reply Brief was filed therein on November 12, 1958. The Court rendered its Opinion on February 26, 1959; petitioner filed a Petition for Rehearing on March 13, 1959, which was denied on March 17, 1959. Petitioner filed a Petition for Hearing in the Supreme Court, State of California, on April 7, 1959, which was denied on April 22, 1959.

In filing the accusatory pleading against petitioner, and throughout the ensuing trial; the district attorney endeavored to establish an agency relationship between the Stadia Corporation and petitioner, well recognizing that, in order for such transactions to come within the purview of the Corporate Securities Law, some agency must be established between the Corporation and petitioner, so that he could be considered in the catagory of issuer or underwriter. However, during his argument at the summation of the trial, the district attorney confessed to the jury that no such agency had been established [Rep. Tr. pp. 1025-1026], quote:

> Mr. Stovitz: * * * Now, there is only an inference in this case, ladies and gentlemen, I don't think

that that inference is supported by very substantial evidence, that the defendant was acting as the agent for this Stadia Oil and Uranium Company in the sale of these stocks. If we had additional evidence of that agency relationship, then I'd say to you there was sufficient evidence to show that there was a violation of the law in connection with Mr. Hefter; but we don't have that evidence.

Manifestly, all of the evidence, in the instant case, established the fact that petitioner purchased the stock for his own account, that he was acting only for himself and that he was not acting for, and had no connection with the Corporation other than as a shareholder. Respondent, in its Brief, admitted that petitioner was the owner of the stock he sold, as follows (pp. 90-91):

"It was not contended that the appellant did not own the shares of stock which he sold to and had issued to the complaining witnesses. And there is no evidence that the appellant ever transferred the shares represented by the certificate for 9850 shares which he asserted he bought before he sold any shares of stock to the complaining witnesses."

(P. 101.)

"There is no question . . . of the passage of title to the shares which appellant sold to the complaining witnesses. There was no evidence that the appellant did not have title to the shares which he had issued to the complaining witnesses."

(P. 88.)

". . . there was no question about the binding nature of the sales."

However, respondent then contended that petitioner was still a broker, as defined in Section 25006, Corporations Code, because he was "purchasing such securities with the purpose of reselling" them. On this point, the District Court of Appeal, State of California, more than 21 years ago, in *People v. Davenport*, 21 Cal. App. 2d 292, had decided that "Counts . . . (which) simply charged defendant with having purchased a security for the purpose of reselling it . . . could not be said (to have) stated a public offense." The trial court refused to give petitioner's instructions among which was included an instruction that the Constitution of California, Article 1, Section 1, guaranteed all citizens the rights of acquiring, possessing and protecting property.

In the Opinion, from which this appeal is being taken, respondent has now taken the position, based on *People v. Woolsey*, 13 Cal. App. 2d 54, that petitioner, even though he was the owner of the stock he sold, was required to have a broker's license, or permit, as specified in Section 25700, Corporations Code, because he was deemed to be one who "engages in business" when selling his own stock for his own account, and this position was taken even though there is no statutory criterion, or previously defined standard, as to what constitutes "engaging in business."

B.

STATEMENT DISCLOSING BASIS FOR JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 1257(3), Title 28, United States Code.

2. The Opinion, rendered by the District Court of Appeal, Second Appellate District, State of California, was entered on February 26, 1959; a Petition for Rehearing, timely filed pursuant to Rule 27(b), Rules on Appeal was denied on March 17, 1959. A Petition for Hearing, timely filed in the Supreme Court, State of California, pursuant to Rule 28(b), Rules on Appeal, was denied on April 22, 1959, Rule 28(e), Rules on Appeal. Therefore, the Opinion, rendered by the District Court of Appeal, became final on March 28, 1959, according to Rule 24(a), Rules on Appeal, and is the decision of the highest court, in the State of California, in which a decision could be had.

The time for the filing of a Petition for Writ of Certiorari extends for ninety (90) days from April 22, 1959, the date when the Petition for Hearing was denied by the Supreme Court of the State of California; thereafter, petitioner applied to, and received from, the District Court of Appeal, Second Appellate District, an Order Staying the Issuance of Remittitur until July 22, 1959, pending the filing of this Petition for Writ of Certiorari herein.

3. A Statement of the Case has been previously presented herein at *A*, above.

In demurring to the Complaint, with which this action was initiated, petitioner relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaran-

teeing due process of law, and the Sixth Amendment, of the Constitution, guaranteeing that an accused be informed of the nature and cause of the accusation; the court dismissed the Demurrer without considering these Constitutional guarantees.

In moving to set aside the Information, as provided in Section 995, Penal Code, State of California, on the ground that petitioner had been committed without reasonable or probable cause, he relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law, and the Sixth Amendment, of the Constitution, guaranteeing that he be informed of the nature and cause of the accusation; the court denied the Motion without considering these Constitutional guarantees.

In demurring to the Information, petitioner relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law, and the Sixth Amendment, guaranteeing that he be informed of the nature and cause of the accusation; the court overruled the Demurrer without considering the Constitutional guarantees.

During his trial, petitioner presented evidence pertaining to a trial, between himself and the complaining witnesses in a Federal Court in another State, relying upon Article IV, Section 1, United States Constitution; the court refused to admit the proffered evidence without considering this Constitutional guarantee.

Further during the trial, petitioner submitted his jury instructions to the court, relying upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law and equal protection of

the law; the court refused to give petitioner's requested jury-instructions without considering these Constitutional guarantees.

In moving that the court dismiss the proceedings, after trial, petitioner relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law; the court denied the Motion without considering these Constitutional guarantees.

In moving for a New Trial, petitioner relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law, and Article IV, Section 1, of the same Constitution, guaranteeing that full faith and credit shall be given in each State to the acts, records, and judicial proceedings of every other State; the court denied the Motion without considering these Constitutional guarantees.

In his Opening Brief, before the District Court of Appeal, Second Appellate District, State of California, petitioner presented Federal Constitutional points in his assignment of Errors therein, relying upon the Fifth and Fourteenth Amendments, guaranteeing due process of law and equal protection of the laws, and Article IV, Section 1, guaranteeing that full faith and credit shall be given in each State to the acts, records, and judicial proceedings of every other State. In his Reply Brief, petitioner additionally relied upon the First Amendment, United States Constitution, guaranteeing freedom of speech and press. These Constitutional guarantees were not considered by the court in its Opinion.

In his Petition for Rehearing, before the District Court of Appeal, petitioner placed additional reliance upon the Sixth Amendment, United States Constitution, guaranteeing him notice of the nature and cause of the accusa-

tion. The court denied the Petition without considering the Constitutional guarantees in any manner whatsoever.

In his Petition for Hearing, before the Supreme Court, State of California, petitioner relied upon the First Amendment, guaranteeing Free Speech and Press; the Fifth and Fourteenth Amendments, guaranteeing due process of law and equal protection of the law; and the Sixth Amendment, guaranteeing notice of the nature and cause of the accusation; all of the United States Constitution. The Court denied the Petition without giving any Opinion whatsoever.

4. The following conclusions of the California court, that:

(a) An owner of securities, although he is not the issuer or underwriter thereof, must apply for and secure a license or permit from the Commissioner of Corporations before he can sell them;

(b) The contracting for the future delivery of stock by an individual, even though for his own account as owner, is evidence of "engaging in business," requiring a permit;

(c) The Corporate Securities Law, State of California, is not unconstitutional, is not repugnant to the United States Constitution;

(d) The Information, upon which petitioner was tried, was sufficient;

(e) The trial court did not err in refusing to admit petitioner's proffered evidence pertaining to a trial between petitioner and the complaining witnesses, in another State (evidence offered to show the litigating of the same issues, as well as for the purpose of impeachment, and to show bias);

(f) The court did not err in refusing to give petitioner's requested instructions;

(g) The court did not err in refusing to discuss, with petitioner's counsel, the requested instructions;

(h) The misconduct of the judge and the district attorney did not deny petitioner a fair trial;

present, for this Court's determination, substantial questions relating to said rights and privileges as exercised by the individual. The criteria, set up by the District Court of Appeal, and application thereof to the individual, are at variance with principles announced by this Court, and not in accord with the applicable decisions of this court.

5. The following cases are believed to sustain this Court's jurisdiction:

Oyama v. California, 332 U. S. 633:

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

Craig v. Harney, 331 U. S. 367:

> "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made."

United States v. Pink, 315 U. S. 203:

"This court will review or independently determine all questions on which a federal right is necessarily dependent."

Fay v. New York, 332 U. S. 261, in which the court held that:

In considering whether the statute is administered so as to produce unconstitutional results, this Court must examine the evidence and reach its own conclusions as to the facts.

Norris v. Alabama, 294 U. S. 587:

"When a federal right has been specifically set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of the evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding Constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured (cited cases)."

Plumbers Union v. Graham, 345 U. S. 192:

". . . It is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records, in the state courts where a claim of consitutionality is effectively made."

C.

THE QUESTION PRESENTED.

Broadly stated, the question presented is this:

Whether the Individual's Constitutionally Guaranteed Right to Acquire, Possess, and Protect Property, Which Includes the Right to Contract for and Dispose of Said Property, Can Be Abrogated by State Law.

Stated more specifically, the foregoing question is divided into sub-questions as follows:

(a) Whether the individual owner of stock, although not the issuer or underwriter thereof, can be required to apply for and secure a broker's permit, or license, from the Commissioner of Corporations, State of California, before he may dispose of said stock for his own account.

(b) Whether the individual owner of stock, although not the issuer or underwriter thereof, can be required to apply for and secure a broker's permit, or license, from the Commissioner of Corporations, State of California, before he may offer for sale, or negotiate for the sale of, said stock for his own account.

(c) Whether the individual owner of stock, although not the issuer or underwriter thereof, can be required to apply for and secure a broker's permit, or license, from the Commissioner of Corporations, State of California, before making a sale thereof if he purchased said stock with the purpose of reselling it or offering it to the public from his own account.

(d) Whether the individual owner of stock, although not the issuer or underwriter thereof, who does any or all of the following acts for his own account:

1. Sells,
2. Offers for sale,

3. Negotiates for the sale of,
4. Purchases stock with the purpose of reselling it, or of offering it to the public,

"engages in business" as a "broker," defined in Section 25006, Corporations Code, State of California, requiring a permit, or license, under Section 25700 of said Code.

(e) Whether the individual owner of stock, not being the issuer or underwriter thereof, can be required to apply for and secure a broker's permit, or license, from the Commissioner of Corporations, State of California, before he may use a circular letter, or advertisement, to make an offer to sell, an attempt to sell, or a solicitation of a sale of his stock, as set forth in Section 25009, Corporations Code, State of California.

(f) Whether the individual owner of stock, not being the issuer or underwriter thereof, is exempt from the Corporate Securities Law, State of California, as provided by Section 25152, Corporations Code, State of California, when making sales of his own property for his own account.

(g) Whether the individual owner of stock, although not an officer or agent of the issuer or underwriter thereof, who, upon selling his own stock for his own account, is accused of committing a felony in violation of Section 26104(a), Corporations Code, allegedly "engaging in business" as a "broker" (Section 25006, Corporations Code) without first having secured a permit from the Commissioner of Corporations so to do, has been given "notice" as guaranteed by the Sixth Amendment, and afforded due process of law guaranteed by the Fifth and Fourteenth Amendments, of the United States Constitution.

(h) Whether Sections 25006 (defining broker), 25008 (defining security), 25009 (defining sale), 25152 (providing exemption of owner, except as provided elsewhere), and 26104(a) (enumerating certain acts), Corporations Code, State of California, are repugnant to the United States Constitution.

(i) Whether the doctrine set forth in *Hall v. Geiger-Jones Co.*, 242 U. S. 539, is applicable to transactions of an owner of securities, although not the issuer or underwriter thereof, or an officer or agent of the issuer or underwriter, and may be invoked as a blanket rebuttal to inquiries as to the Constitutionality of the California Corporate Securities Law.

[The *Geiger-Jones* decision may be pertinent as to the validity of the "Blue-Sky" law, of Ohio State, in controlling the right of an individual to act in the capacity of "broker" or "agent."

But the Supreme Court *did not have before it the matter of a legislative enactment which abrogated the securities-owner's constitutionally-guaranteed right to buy and sell securities* issued by others, *solely for his own account*; it did not have before it a law which directly abridged the privileges and immunities of an individual owner of securities by delegating, to an administrative officer, plenary legislative powers the exercise of which could effectively throttle the owner's right of free speech and free press guaranteed by the First and Fourteenth Amendments of the United States Constitution; it did not have before it statutes containing terms so vague and ambiguous that they "prohibited conduct which may be prohibited and conduct that may not," affording "no reasonably ascertainable standard of guilt" and "therefore too uncertain and vague to be enforced" (*In re*

Bell, 19 Cal. 2d 488), and that a charge for violation thereof—against a securities-owner—would annihilate his right to *notice* under the Sixth Amendment, United States Constitution. In other words, the Supreme Court did not have before it a case wherein a person's constitutionally guaranteed rights were abrogated by legislative enactment, as in the case at bar; instead, it had before it, in the *Geiger-Jones* case, a situation wherein the individual sought to exercise rights, that existed as a matter of legislative grace, without complying with the requirements which were concomitant with their exercise.

Because of the vast dissimilarity between the grounds basing the *Geiger-Jones* case and those basing the case at bar, the use, by the District Court of Appeal in its Opinion, of the *Geiger-Jones* case as a blanket refutation of petitioner's assertion, that the California Corporate Securities Law is unconstitutional, appears to be a frequently used expedient to avoid declaring the Corporate Securities Law, wholly or in part, unconstitutional.

It would appear that citing the *Geiger-Jones* case, as a blanket refutation of petitioner's contention that the Corporate Securities Law of California is unconstitutional, is an "insubstantial finding of fact screening reality" (*Plumbers Union v. Graham*, 345 U. S. 192), which, if permitted to continue in force and effect, would defeat petitioner's "constitutional freedom," including "the guarantees of the Bill of Rights."]

(j) Whether the plenary power delegated to the Commissioner of Corporations, by the California Legislature under the Corporate Securities Law, permits the denial of the individual's Constitutional rights to acquire, possess, protect, dispose of, and contract for, property.

(k) Whether a denial of procedural due process is reversible error.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The criterion, applied by the State court, in holding that an owner of securities, although neither the issuer nor the underwriter thereof, is required to apply for and secure a permit, or license, from the Commissioner of Corporations, State of California, before he may sell said personally-owned securities, is that said owner "engages in business" (Op. p. 15). The State relied on *People v. Woolsey*, 13 Cal. App. 2d 54, and Sections 25006, 25700, Corporations Code, State of California. Assuming the correctness of the contention, as applied, nevertheless, this Court will inquire whether the criterion, as applied, denied rights safeguarded by the Fifth and Fourteenth Amendments, United States Constitution.

* * * * * *

In the *Woolsey* case, it was decided that the Legislature had the right to regulate a securities-owner's disposition of his own stock, of which he was neither the issuer or underwriter, for his own account, a doctrine based upon *State v. Swenson*, 172 Minn. 277, in which the Minnesota Supreme Court stated that the uniform trend of the Minnesota decisions was *not* in harmony with *People v. Pace* (Calif.), 73 Cal. App. 548, but was in an *opposite* direction therefrom. The *Pace* case stated:

> "It is difficult to believe that the Legislature intended to impose burdens on certain individuals in (a) manner that would not apply to all persons of the same class, for certainly there is no basis in law for such a distinction.
>
> "As we have pointed out in the outset of this opinion, it is readily apparent that if the act in ques-

tion is sustained, a great many individuals *who are owners of securities* which they themselves did not issue or underwrite, *would be required to secure a broker's license* . . .

"Any legislative enactment that is reasonably subject to the interpretation we have just pointed out manifestly is in conflict with the Fourteenth Amendment to the Constitution of the United States. In Corpus Juris, page 1144, this proposition is thus stated: 'The amendment (the Fourteenth) was intended to secure equality of right, and *it renders unconstitutional all laws which may be properly construed as applying to persons or property arbitrarily and with discrimination, unequally or unjustly.*'

"We are of the opinion that the Corporate Securities Act under consideration, in so far as it attempts to require a *natural person* to secure a broker's permit as provided in said act *before he may lawfully sell his* OWN *securities*, where he is not the issuer or underwriter of the same, *is unconstitutional and invalid* for the reasons herein set forth." (Emphasis added.)

The same court, a little more than a year after it had decided the *Woolsey* case, decided in *People v. Davenport*, 21 Cal. App. 2d 292, that the doctrine set forth in the *Pace* case was the correct one for California by quoting from it as follows:

"The attorney general conceded that *it would invade the constitutional rights* of a citizen if he were prohibited from selling his securities, which he would have a legal right to buy and possess . . .

"The act . . . provides a power to refuse a permit, which would make absolute prohibition in the sale of one's securities. The only purpose of the act . . . is to lay a foundation for the Corporation Commissioner that may or may not, according to his finding, result in an absolute prohibition of the sale of his securities." (Emphasis added.)

In the case just quoted, the court also said that if one of the primary objects of government is to enable the citizen to acquire, possess, and protect property, a right guaranteed by the Constitution, *how can it be impaired by legislation?*

(*People v. Pace, supra*):

"*But nowhere* in the authorities sustaining the regulation of the business of brokers *do we find authority* . . . that the police power . . . may be invoked to interfere with the sale by an individual of his own property when the acquiring and possession of such property is not contrary to law. * * * If the regulation of the business of brokers . . . cannot be enforced . . . without giving him, (the commissioner) the power to reach out and *invade individual rights*, then the legislation in question must fail . . . of the purpose which is sought by this enactment.

"The section of the act in question, if sustained, in connection with other provisions of the act, 'does more than regulate' the mode of 'disposing of property'. As we have heretofore pointed out, the corporation commissioner would have the power . . . to refuse a person a broker's permit . . . and by such refusal *the person would be prevented from disposing of his own individual property which he had lawfully acquired and lawfully possessed* . . . * * *

The rule in determining whether the act is in conflict with constitutional guaranties is *whether or not the act is broad enough to authorize such unconstitutional act.*" (Emphasis added.)

The preceding citations were based upon property rights guaranteed by the Fifth and Fourteenth Amendments, as well as Article 1, Section 1, California Constitution. In *Ex Parte Quarg*, 149 Cal. 79, the court amplified the meaning of Article I, Section 1, California Constitution, to include the right to acquire and possess the absolute and unqualified title to every species of property recognized by law with all of the rights incidental thereto, and, in connection with the right of personal liberty, the right was included to dispose of such property in such innocent manner as the owner thereof pleased.

In *Roystone v. Darling Co.*, 171 Cal. 525, the court extended this same Constitutional guarantee to include the individual's right to contract concerning the use, enjoyment, and disposition of said property; in *Binford v. Boyd*, 178 Cal. 458, it was ruled that the individual's Constitutionally guaranteed right to acquire, possess, and protect property is *invaded* if he is *not* at liberty to contract with others concerning the use to which he may subject his property, or the manner in which he may enjoy it. These property rights were specifically applied to a securities-owner's rights to dispose of his own securities, of which he is neither the issuer nor underwriter, in *Pollack v. Staunton*, 210 Cal. 656, when it stated that a *natural person* may sell his own securities, for his own account, without being required to obtain a permit, or license, from the Corporation Commissioner. The court, in *People v. Lesser*, 123 Cal. App. 489, further held that a *natural*

person had the right to sell his own stock, which he did not issue or underwrite, for his own account for such price as he could obtain in fair barter, citing in support thereof the *Quarg*, *Pace*, and *Pollack*, cases. In the *Lesser* case, the court further said:

> "Though in other jurisdictions, the courts have announced rules that may be at variance with the rule established by our courts in this regard, *we are bound by the precedent here established. The act* under which the defendant is charged is one avowedly seeking to regulate the sale of property, and *in so far as the regulation takes away the right of the owner to sell his own property, it is void. *. *. * Under the guise of 'regulation', a long established constitutional right, such as here involved, may not be abridged.*" (Emphasis added.)

Petitioner was the owner of the stock, which he sold. This fact is supported by the evidence, was conceded by respondent, in its Brief, and his ownership of the stock is referred to in the Opinion. This Court's attention is respectfully directed to the Statement of the Case herein where the foregoing is set forth.

The Legislature, in enacting Section 25152, Corporations Code, State of California, provided therein that the Corporate Securities Law should not apply to the sale of securities made by an owner, such as petitioner, for his own account, where he was not the issuer or underwriter thereof. However, this exemption is illusory because the Legislature *abridged* the owner's constitutionally guaranteed property rights by opening said section with the phrase "Except as expressly provided in this division," a phrase which therewith made Section 25152 subservient to Sections 25006 and 25700 of the same division. Section

25006, defining "broker," provides that the term includes "every person, other than an agent, who . . . engages . . . in the business of selling, offering for sale, or negotiating for the sale of, any security issued by others." It is apparent that, in excluding agent from its purview, Section 25006 was made broad enough to include an owner of stock within its scope, and the "exemption" ostensibly afforded to an owner, under Section 25152, becomes illusory. Solely upon the whim or caprice of the law-enforcement authorities, the securities transactions of an owner can be deemed to be exempt, under Section 25152, or they can be deemed to be evidence of the owner's "engaging in business," under Section 25006, the acts disclosed therein being such as to require a certificate so to do under Section 25700.

That the securities-owner's liberty, and property rights, may be jeopardized by the whim or caprice of the law-enforcement authorities, as aforementioned, is possible because Section 25006 pivots upon the uncertain substantive element "engage in . . . business" for which there is no statutory definition. The court found, in *Taft v. Shaw*, 284 Mo. 531, that:

> "Statutes and ordinances which fix crimes, or quasi crimes, should so fix them *that there could be no uncertainty*. They should be so worded *that one could read them, and know* whether or not he was violating the law. *They should not be so worded as to leave their substantive elements to the caprices of either judge or jury.* In other words *the law should be complete and definite*. What would be 'reasonable effort' under this law is left a question for the court or jury. What in the minds of one court or jury might be 'reasonable effort' might not be so consid-

ered by another court or jury. Each tribunal would be making its own ordinance. *This will not do for a law or ordinance criminal in* character." (Emphasis added.)

What would constitute "engaging in business," in the mind of one judge, jury, or law-enforcement agency, might not be considered to be "engaging in business" by another judge, jury, or law-enforcement agency, because there is no statutory criterion which determines what constitutes "engaging in business." Under such existing circumstances, a law-enforcement officer, may, at his whim or caprice, discriminatorily choose between two owners of the same securities issued by the same corporation, and acquired by them in identically the same manner and at the same time under the same circumstances, and decide that the sale of one of them was exempt as an owner, under Section 25152, while the sale of the other was evidence of "engaging in business" as a "broker," under Section 25006; which requires a previously-secured certificate, under Section 25700; not having previously secured a certificate from the Commissioner, under said Section 25700, the second owner, could be deemed to have committed a felony under Section 26104 and 26104(a), Corporations Code. Figuratively speaking, the possible enforcement of Section 25006, as just disclosed, is a "Damoclesian sword" hanging over the heads of each and every owner of securities in the State of California. Such statutes merit the statement found in *In re Bell*, 19 Cal. 2d 488:

> "Language prohibiting conduct which may be prohibited and conduct that may not, affords no reasonably ascertainable standard of guilt and *is* there-

> fore *too uncertain and vague to be enforced.* (Cited cases.) *A conviction based on such a statute can not stand* even though the acts of misconduct in the particular case could be validly prohibited by properly drafted legislation. (Emphasis added.)

As pointed out, previously, in *People v. Pace, supra,* and *People v. Davenport, supra,* the plenary powers delegated to the Commissioner of Corporations, by Section 25706, Corporations Code, are such as to render Sections 25152, 25006, and 25007, which must be read and interpreted in connection therewith, unconstitutional along with it. Section 25706, in the words of the *Davenport* case, "provides a power to refuse a permit, which would make *absolute* prohibition in the sale of one's securities," or, in the words of the *Pace* case, "the corporation commissioner would have the power . . . to refuse a person a broker's permit . . . and by such refusal the person would be prevented from disposing of his own individual property which he had lawfully acquired and lawfully possessed;" "the rule in determining whether the act is in conflict with constitutional guaranties is whether or not the act is broad enough to authorize such unconstitutional act."

> The Legislature may commit, to an administrative official, power to determine whether the facts of a particular case bring it within *a rule or standard previously established* BY THE LEGISLATURE *for his governance*; but, if no such standard be prescribed, there is an attempt to entrust a mere administrative officer with plenary power of the Legislature.
>
> *Dominguez Land Corporation v. Daugherty,* 196 Cal. 468.

A perusal of Section 25706, Corporations Code, will reveal that the Legislature, in the Corporate Securities Law, did not provide a previously established "rule or standard" for the governance of the Corporation Commissioner in determining the qualifications, or lack of them, of an applicant for a broker's certificate; instead, Section 25706 gives the Commissioner *untrammelled* discretion in determining whether or not a certificate shall be granted. Such plenary power is an effective previous restraint upon one's Constitutional rights, and is directly in point with *Sala v. People of the State of New York*, 334 U. S. 558; *Staub v. City of Baxley*, 78 S. Ct. 277; the Commissioner of Corporations stands athwart the channels of free speech, and the exercise of dominion and control over one's own money and property, an obstruction that can be removed only be being subjected to costly criminal proceeding, possibly leading to conviction necessitating an appeal. There can be no further previous restraint upon the exercise of one's Constitutional guarantees.

From the preceding discussion, it is obvious that the California Legislature, by incorporating in Section 25152, Corporations Code, (which section appears to exempt the securities transactions of an owner, neither the issuer nor underwriter thereof) a phrase which makes Section 25152 subservient to Section 25006, therewith made a law which abridged the privileges and immunities of the citizens of the United States, residing in California, the enforcement of which deprived petitioner of his liberty and property without due process of law, and denied him equal protection of the laws contrary to the guarantee stated in Section 1, Amendment 14, United States Constitution.

* * * * * * * *

(2) The same criterion, applied by the State court, in holding that an owner of securities, although neither

the issuer nor underwriter thereof, when buying and selling securities for his own account, is required to apply for and secure a permit, or license, from the Commissioner of Corporation as provided in Section 25700 Corporations Code, before he may purchase securities with the purpose of reselling them to the public, is that he "engages in business" as set forth in Section 25006, Corporations Code. Again, assuming the correctness of the contention, nevertheless, this Court will inquire whether the criterion, as applied, denied rights safeguarded by the Fifth and Fourteenth Amendments.

—— O ——

Although petitioner was the unqualified owner of the stock he sold, as set forth previously herein, nevertheless, he was charged with, and convicted for, "engaging in business" as a "broker" (Section 25006, Corporations Code), the statutory definition of which includes "purchasing such securities with the purpose of reselling them, or of offering them for sale to the public."

Upon reading the quoted phrases, the question logically arises: WHO IS THE PUBLIC? Fred G. Athern, former Commissioner of Corporations for the State of California, authored the following statement, printed in The Recorder of June 22, 1931, page 5:

> "It certainly cannot be that the purchase of securities with the intention of reselling them is an effort to evade the provisions of the Corporate Securities Act. *Very few persons ever buy securities except with the* INTENTION *of reselling them.*" (Emphasis added.)

This quotation, uttered by a former official, whose responsibility it was to administer the Corporate Securities Law, has a profound meaning. His was the sensible

realization that "to purchase securities with the intention of reselling them" could not constitute a violation of the Corporate Securities Law because "very few persons ever buy securities *except* with the intention of reselling them".

Obviously, every person, who purchased securities, would furnish respondent with *prima facie* evidence that he did so "with the purpose of reselling them", which, when, by whim or caprice, a law-enforcement agency decided that the purchase was evidence of "engaging in business", (there being no statutory definition thereof for its guidance) would make the stock-purchaser a "broker", under Section 25006, Corporations Code. If every person, who purchased stock, could be deemed to be a "broker", what and where is the PUBLIC to whom stock could be offered. The profit motivation, in the mind of every Californian, makes him a "broker" every time he buys securities. In the words of *People v. Pace, supra*, "it is readily apparent that if the act in question is sustained, a great many individuals who are owners of securities which they themselves did not issue or underwrite, would be required to secure a broker's license".

Thus it is that every person, in the State of California, who buys securities, has the burden of proving that he bought the securities with the intention, or purpose, of keeping them until he died. Otherwise, if he, by honest self-assessment, finds that his purchase of securities is being made "with the purpose of reselling them", he must apply for and secure from the Commissioner of Corporations a certificate, under Section 25700, before he purchases said securities as previously presented herein; Section 25706, Corporations Code, gives the Commissioner plenary power to grant or deny the application

for a certificate, the denial of which is a previous restraint (*Staub v. City of Baxley, supra*) upon the prospective securities-owner's property rights guaranteed to him by the Fifth and Fourteenth Amendments, United States Constitution.

* * * * * * * *

(3) The same criterion, applied by the State court, in holding that an owner of securities, although neither the issuer nor underwriter thereof, by buying and selling securities for his own account, committed a felony in violation of Section 26104(a), Corporations Code, is that he "engages in business", as set forth in Section 25006, Corporations Code, without first applying for and securing a permit, or license, from the Commissioner of Corporations, so to do. In further assuming the correctness of this contention, nevertheless, this Court will enquire whether the criterion, as applied, denied rights safeguarded by the Fifth, Sixth, and Fourteenth, Amendments, United States Constitution.

—O—

An Indictment, or Information, is *not* sufficient, and will *not* sustain a conviction, unless it charges *all* of the essential elements of the crime.

Banks v. United States, 239 F. 2d 409.

Or, to state the point affirmatively:

An Indictment, or Information, *must* contain *all essential elements of the crime charged*, and INFORM defendant therein of the nature and cause of the accusation against him, with sufficient certainty, to enable him to prepare his defense and, if he is later charged with the same offense, to interpose a plea of double jeopardy.

United States v. Apex Distributing Co., 148 Fed. Supp. 365.

Furthermore, it must be borne in mind:

> The validilty of an Indictment, or Information, is basic to any criminal conviction.
>
> *United States v. Russo*, 155 Fed. Supp. 251.

A typical count of the Information, under which petitioner was charged and convicted, is set forth in the Statement of the Case herein and this Court's attention is respectfully directed thereto in connection with the following argument.

Section 952, Penal Code, State of California, provides that the charging of an offense may be made in any one of the following ways:

(a) "in the words of the enactment describing the offense" or

(b) "in the words of the enactment . . . declaring the matter to be a public offense" or

(c) "in any words sufficient to give the accused notice of the offense of which he is accused."

In *In re Harder*, 9 Cal. App. 2d 153, the court declared therein:

> "We cannot have recourse to common law to determine prohibited acts. This rule is clearly stated in 7 California Jurisprudence, page 841, as follows, to wit: 'There is no criminal common law in California. All public offenses or crimes are statutory. . . .'"

Respondent has endeavored to base the count, charging petitioner with Violation of Section 26104(a), on Statutes, existing in the Corporations Code, by under-

scoring portions of those sections as follows (Resp. Br., pp. 60-62):

(Section 26104)

". . . every person who does any of the following acts is guilty of a public offense . . ."

(Section 26104(a))

"Knowingly sells any security contrary to the provisions of this division. . . ."

(Section 25700)

"No person shall act as a broker until it has first applied for and secured from the commissioner a certificate, then in effect, authorizing it so to do."

(Section 25006)

"'Broker' includes every person who engages in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in, any security issued by others, or of purchasing such securities with the purpose of reselling them to the public . . ."

Thereafter, respondent makes the following statement, in which it delineates the alleged statutory support for the Information, with reference to the above-quoted sections (Resp. Br., pp. 63-64):

"A comparison between the underscored words in the Corporations Code Sections 26104, subdivision (a), 25700 and 25006 as set forth above, and underscored words of the Information, as set forth above, shows that the appellant was charged specifically with violation of Corporations Code Section 26104(a) in the words of that statute, which makes

it a public offense to "knowingly sell any security contrary to the provisions of the Corporation Securities Law (Corporations Code Section 26104, subdivision (a)); the section which prohibits acting as a broker without a certificate to do so (Corporations Code Section 25700); and the section which defines the term 'broker', *which section is specifically referred to therein.* (Corporations Code Section 25006.)" (Emphasis added.)

It is significant that respondent called attention to Section 25006 as being "specifically referred to" in the Information; Sections 26104 and 25700 were not specifically referred to, and can not be supplied by argument, intendment, or inference. *Champlin Ref. Co. v. Corporation Commissioner*, 286 U. S. 210.

It is incumbent upon respondent, in attempting to define a statutory crime, by assembling and correlating statutes, to collect and connect *all* of the pertinent code sections. Good pleading requires that the Information should unmistakably inform the accused as to the law he is alleged to have violated. *Corson v. United States*, (Calif.) 147 F. 2d 437. The fact that respondent called upon Section 25700 and 26104, neither of which is specified in the Information, in order to state the semblance of a statutory offense is, in itself, an admission that the Information does not charge a public offense; Section 26104 is required in order to establish that certain acts constitute a public offense, and Section 25700 is, requisite in a valid Information, to establish that a license, permit, or certificate, *must* first be obtained, from the Commissioner of Corporations, in order to do certain otherwise prohibited acts.

In *People v. Williams*, 27 Cal. 2d 220, the court stated that:

> "Of course, it is elementary that *every fact or circumstance* necessary to constitute the crime charged *must be alleged and proved*, and *the proof must correspond with the allegations in the pleading.*" (Emphasis added.)

Does the Information allege every *fact* or circumstance necessary to constitute the crime charged? An analysis of the allegations shows:

(a) petitioner was charged with the crime of violation of Section 26104(a), Corporations Code;

(b) the alleged crime was a felony;

(c) petitioner allegedly did "engage in the business" of buying and selling, offering for sale, and negotiating for the sale of securities;

(d) petitioner allegedly did purchase securities with the purpose of reselling them to the public;

(e) the alleged acts were as defined in Section 25000, Corporations Code;

(f) petitioner allegedly did sell and offer and caused to be sold a security;

(g) without first having secured a license to so do.

(a) Section 26104(a) does not specify that any of the acts disclosed therein constitutes a crime, so the allegation that petitioner committed the crime of violation of Section 26104(a) is a conclusion of the pleader, and not a fact. (*People v. Davenport, supra.*)

(b) That the alleged crime was a felony is likewise a conclusion of the pleader, there being no statute cited therein which so specifies.

(c) That petitioner did "engage in . . . . business" is also a conclusion of the pleader, there being no statute cited therein, which defines *what* constitutes "engages in business".

(d) That petitioner allegedly purchased securities, with the *purpose* of reselling them to the public, is a conclusion of the pleader requiring proof of specific intent; in *People v. Davenport, supra,* it was decided that purchasing securities "with the purpose of reselling them" to the public was not a public offense.

(e) That the alleged acts charged were as defined in Section 25006 is a conclusion of the pleader, the same acts are also exempt as set forth in Section 25152; furthermore, "engages in business" is *not* defined in Section 25006.

The Information failed to allege the statutory basis (Section 26104) for the charged crime, or the statutory requirement (Section 25700) that a permit, license, or certificate, was required before doing the acts which petitioner allegedly did.

The only items, in the list above, which were proved were:

(f) That petitioner sold some of his own stock, of which he was neither the issuer nor underwriter, for his own account.

(g) That he conceded that he did not have a license, permit, or certificate, from the Commissioner of Corporations, prior to the selling of his own stock, and that he had *not* been notified that he was required to obtain said certificate prior to the selling of his ow stock.

It is patent, from the foregoing analysis, that the Information did not meet the requirements, set forth in

People v. Williams, supra, as to the charging a crime, and the proof required to sustain a conviction thereunder did not correspond; petitioner was convicted of a crime which was not charged in the Information, and, with no crime charged, there was nothing to prove—there were no true issues declared in the Information.

The vagueness and uncertainty attaching to the phrase "engages in business", there being no statutory definition thereof, in prohibiting conduct which may be prohibited and conduct which may not, fails to set forth any ascertainable standard of guilt, and, therefore, is unenforceable.

People v. McCaughan, 49 Cal. 2d 409.

"'(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' (Cited cases.) A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it. (Cited cases)".

In re Clarke, 149 Cal. App. 2d 802.

"In determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required of them, the Court must endeavor, if possible, to view the statute from the standpoint of a reasonable man who might be subject to its terms (Cited case); and the requirement of reasonable certainty does not preclude the use of ordinary terms which find adequate interpretation in common usage and understanding. (Cited case)."

In *People v. Fuski*, 49 Cal. App. 4, the court stated that:

> "The main purpose of requiring the various elements of a crime to be set out in an indictment or information is to enable him (defendant) to suitably prepare his defense. *He is presumed to be innocent and*, therefore, *to have no independent knowledge of the facts that constitute the offense.*" (Emphasis added.)

It is apparent that, in view of the foregoing ruling, because an accused "is presumed to be innocent and to have no independent knowledge of the facts that constitute the offense," it is not incumbent upon him to search the Corporations Code and endeavor to assemble therefrom statutes which, when considered together, might define a public offense with which he is supposed to be charged. On the same basis, neither can an accused be expected to peruse the "transcript of the evidence before the committing magistrate." (*People v. Roberts*, 40 Cal. 2d 483) to ascertain "the nature and cause of the accusation" (Sixth Amendment, United States Constitution). The Amendment referred to states explicity that:

> "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation. . . ."

Thus, in the words of the above-quoted Amendment, "the accused *shall* be informed," is not required to inform himself. In *People v. Pond*, 44 Cal. 2d 665, the court stated that:

> "*Notice of the specific charge* against defendant is a Constitutional right of the accused. (*Cole v. Arkansas*, 333 U. S. 196.)" (Emphasis added.)

To comply with the Sixth Amendment, United States Constitution, an Indictment, or Information, must be sufficiently specific to advise the defendant of the nature and cause of the accusation, *Wong Tai v. United States* (Calif.), 273 U. S. 77.

That specificity, in the charging of a crime, is the prime requisite in preparing an Information, and failure to be specific in charging an offense, can be fatal to an accusatory pleading is dealt with in *United States v. Hess*, 124 U. S. 486:

> "* * * The general, and, with few exceptions . . . the universal rule on this subject, is, that all of the material facts and circumstances must be stated, or the indictment will be defective. *No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially,* or by way of recital."

Respondent failed to include, in the Information, citation of the specific statute which discloses that certain acts were prohibited except after the obtaining of a certificate from the Commissioner of Corporations (Section 25700), and the specific statute which specified that the doing of those acts, without having obtained said certificate prior thereto, was a public offense (Section 26104), both of which were essential elements in charging petitioner with the alleged offense in the case at bar. Such omissions were fatal because "no essential element of the crime *can be omitted* with *destroying* the whole pleading."

Also, respondent is precluded from supplying the omitted elements, "by intendment or implication," it being requisite that the "charge *must* be made *directly* and *not inferentially*, or by way of recital."

> Under this rule, respecting the contents of an indictment or Information with regard to a statute alleged to have been violated: *where reference to a statute must be considered because the Indictment is senseless, or lacking in essential allegations, unless the reference is considered, a misrecital of the statute may be fatal.*
>
> *United States v. Patterson*, 155 Fed. Supp. 669.

> Likewise, the complete failure to cite a statute, "where reference to the statute must be considered because the" Information "is senseless, or lacking in essential allegations, unless the reference is considered," will destroy the whole pleading (*United States v. Hess, supra*).

With regards to the pleading of a statutory crime, which respondent chose to do in terms of the statute, the court said, in *Azuma Kubo v. United States* (Calif.), 31 F. 2d 88:

> "* * * As a general rule, no doubt, it is sufficient to charge a statutory crime in the words of the statute; *but this is only true where the words in themselves fully, directly, and expressly, without any uncertainty and ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished. United States v. Carll*, 105 U. S. 611." (Emphasis added.)

Even though the Information charges that petitioner did "engage in the business" of buying and selling securities, etc., allegedly defined in Section 25006, Corporations Code, the words, "engage in . . . business," do not "in themselves fully, directly, and expressly, without any uncertainty and ambiguity, set forth . . . elements . . . necessary to constitute the offense intended to be punished"; the phrase, "engage in . . . business" does *not in itself*, "fully, directly, and expressly, without any uncertainty and ambiguity, set forth" *any* "of the elements necessary to constitute the offense intended to be punished"; the phrase has no statutory definition whatsoever.

Furthermore, the allegation, in the Information, that petitioner had done certain acts "without first having applied for and secured . . . a license so to do" does not specify any statutory requirement that a certificate, permit, or license must be secured by an owner before said owner of stock, who is neither the issuer nor underwriter, thereof, may sell said stock for his own account.

> A criminal accusation MUST *contain* ALL *the ingredients of the offense* with which the defendant is charged, *in direct language*, leaving no essential to be reached by inference or argument.
>
> *People v. Green*, 65 Cal. App. 234.

The court stated, in *People v. Barry*, 153 Cal. App. 2d 193:

> "The sufficiency of an Information *must be tested in the light of the averments thereon contained.*" (Emphasis added.)

See:

People v. Pustau, 39 Cal. App. 2d 407.

The Supreme Court of the State of California, in *In Re Lockett*, 179 Cal. 581, stated:

> "It must be conceded, I think, that *it is essential to the validity of a statute creating a criminal offense that it show* in language capable of being understood by a person of ordinary intelligence *what it is that is prohibited.*" (Emphasis added.)

Since it was held, in *United States v. Hess, supra*, that *no* essential element of the crime can be omitted without destroying the whole pleading, the omission cannot be supplied by intendment or implication, (or a transcript of evidence before the committing magistrate. *People v. Roberts, supra.*) And neither can any essential be reached by argument (*People v. Green, supra*), respondent is precluded from arguing, at this point, that, from the allegation that petitioner had not secured a permit from the Commissioner of Corporations, "a person of ordinary intelligence" would presume that some statute must require petitioner to have secured a permit and, therefore, the "person of ordinary intelligence" would know that a crime had been committed.

In *United States v. Cruikshank*, 92 U. S. 542, in speaking of the necessity of greater particularity of statement, the Court said:

> "The object of the indictment is, *first*, to furnish the accused with such a description of the charge against him as to enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, *second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction*, should one be

had. For this, *Facts are to be stated*, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances." (Emphasis added.)

To the foregoing, a further requirement as to particularity of stating a crime, in the Information, is found in *Elder v. United States* (Calif.), 142 F. 2d 199, that it:

> ". . . include a recital of the acts alleged to constitute the offense in detail sufficient to bring them *within the scope of the offense* . . ." (Emphasis added.)

The Information, in the case at bar, is insufficient in that it failed to charge petitioner with the commission of a public offense in the terms of a statute; it failed "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law" and it failed to "include a recital of the acts alleged to constitute the offense in detail *sufficient to bring them within the scope of the offense.*" It stated the pleader's conclusions (*People v. Davenport, supra*), and a charge is insufficient which states mere legal conclusions (*People v. Green, supra*); none but ultimate facts are to be pleaded, a rule which applies to all kinds of pleading, whether civil or criminal (*People v. Timken*, 49 Cal. App. 18). As a general rule, no inferences of fact *not alleged* can be invoked to aid an Indictment, or Information, which must charge the crime in *words*; where the ultimate facts, necessary to complete description of the offense, have been omitted

from the pleading, it is insufficient (*People v. Lamanuzzi*, 77 Cal. App. 301). The court also held, in *People v. Tinnen, supra*:

> "In thus construing the information, we have not been unmindful of the rule that sufficient facts must be directly alleged in a criminal pleading from which it can be determined *upon inspecting or examining it* that the acts complained of are wrongful and unlawful and that, in construing an indictment or an information, nothing must be left to implication, intendment or conclusion." (Emphasis added.)

It is obvious that the count, in the Information, in the instant case, just analyzed (and the same may be said for all of the other counts), falls far short of the rule *that sufficient facts must be* DIRECTLY *alleged*" "from which it can be determined, "UPON INSPECTING AND EXAMINING IT, that the acts complained of are wrongful or unlawful," or that the facts alleged are such as to plainly show, to "a person of ordinary intelligence," that petitioner had committed a crime.

Thus, it is clear that, without the use of intendment, inference, argument, or explanation, the Information failed to give petitioner sufficient "notice" of the crime charged, when said Information is subjected to the test of charging an offense in terms of the statute, or to the test of the averments contained therein; the Information herein, in failing to give "notice" to petitioner, as guaranteed in the Sixth Amendment, United States Constitution, also denied him due process of law, guaranteed by the Fifth and Fourteenth Amendments.

* * * * * * * *

(4) The same criterion, applied by the State court, in holding that an owner of securities, although neither

the issuer nor underwriter thereof, is required to apply for and secure a permit, or license, from the Commissioner of Corporations, prior to his making a "sale" as defined in Section 25009, Corporations Code, is that he "engages in business" as used in Section 25006, Corporations Code. Assuming, further still, the correctness of the contention, nevertheless, this Court will inquire whether the criterion, as applied, denied rights safeguarded by the First and Fourteenth Amendments, United States Constitution.

—O—

During the preceding argument, under (1), the phrase, "engage in business," was shown to be a substantive element, by the statutorily undefined meaning of which the operation of Section 25006, Corporations Code, is rendered unconstitutional in that, together with Sections 25700, and 25706, the Commissioner of Corporations has the plenary power to abrogate, or not, as he may determine, a securities-owner's constitutionally guaranteed property rights under the Fifth and Fourteenth Amendments, United States Constitution.

Section 25006, operating together with Sections 25700 and 25706, can be used to perpetrate a further previous restraint upon a securities-owner, who is neither the issuer nor underwriter thereof, should he talk or write about his stock.

Should said owner of securities, of which he is neither the issuer nor underwriter, undertake to "sell" said securities, Section 25152 notwithstanding, while ostensibly under the purview of Section 25006 because he is deemed to "engage in business," he could be required to obtain a certificate, as required in Section 25700, even though no cash or securities were exchanged, because the act of

"selling" (Section 25009, Corporations Code) includes the use of a "circular letter" or an "advertisement" in making "an offer to sell, an attempt to sell," or a "solicitation of a sale" of his securities; and, should the Commissioner of Corporations deny said securities-owner a certificate, which he has plenary power to do under Section 25706, Corporations Code, the owner's right of free press, guaranteed under Amendment 1, United States Constitution, will have been abrogated.

Likewise, should the same owner be denied a certificate, by the Commissioner, his right to offer for sale, or negotiate for the sale of, his stock, for his own account, will be nullified even though he is also guaranteed the right of free speech under the First Amendment, United States Constitution. About such a situation, the Court, in *In re Bell, supra*, citing *Thornhill v. Alabama*, 310 U. S. 88, in support thereof, said:

> "A penal statute that 'does not aim specifically at evils within the allowable area of state control, but on the contrary sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of free speech or of the press . . . lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' and '*results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purview.*' (*Thornhill v. Alabama*, 310 U. S. 88.)" (Emphasis added.)

Thus, the securities-owner's constitutionally guaranteed right of free speech is under "a continuous and pervasive restraint" because, should he so much as talk about his purchase of his securities, their price, their prospective

future, etc., such "discussion . . . might reasonably be regarded within" the "purview" of Section 25000 of the Corporations Code, by "local prosecuting officials," thereby lending said Section "to harsh and discriminatory enforcement" "against particular" persons "deemed to merit their displeasure."

Schneider v. State, 308 U. S. 147.

> "The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth Amendment against abridgment by a state."

Bridges v. California, 314 U. S. 252.

> "For the First Amendment does not speak equivocally. It prohibits *any law* 'abridging the freedom of speech, or of the press.' *It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.*" (Emphasis added.)

* * * * * * * *

(5) The same criterion, applied by the State court, in holding that an owner of securities, although neither the issuer nor underwriter thereof, when buying and selling securities for his own account, does not come under the protection of the "exemption" Section 25152, Corporations Code, is that he "engages in business" as set forth in Section 25000, Corporations Code. Again assuming, further still, the correctness of the contention, nevertheless, this Court will inquire whether the criterion, as applied, denied rights safeguarded by the Fourteenth Amendment, United States Constitution.

—O—

Article I, Section 10, Cl. 1, United States Constitution, provides, in part:

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . ."

The Constitution declares that all men are by nature free and independent and have certain inalienable rights, among which are those of acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness. These rights are *invaded* if the individual is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it.

Binford v. Boyd, 178 Cal. 448.

The right to make contracts, common to all legitimate vocations, is a property right, the enjoyment of which is guaranteed by the Constitution; and though the Legislature may prescribe the form in which contracts shall be executed in order that they may be valid and binding, *it cannot limit the right of the parties to incorporate into their contracts, otherwise valid, such terms as may be mutually satisfactory to them.*

Stimson Mill Co. v. Braun, 136 Cal. 122;
People v. Holder, 53 Cal. App. 45.

The provisions declaring that all men possess "certain inalienable rights," among them the right of "acquiring, possessing, and protecting property," *is a guarantee that includes the right to contract concerning the* use, enjoyment, and *disposition of property*, which cannot be taken away or restricted by the Legislature.

Roystone Co. v. Darling, supra.

The preceding cited California authorities are in consonance with the Federal Constitution in upholding the individual's right to contract concerning the sale and disposition of property, recognizing that the Constitution of the United States is a solemn compact between the States, to be *enforced* by State legislation, or *by judicial action*; the State officer, whose duty it is to adjudicate or execute the laws, are governed by it; and, being a part of the supreme law of the land, it is a part of the law of each State.

In the Matter of Romaine, 23 Cal. 585;
Taylor v. Taintro, 16 Wall. 366, 21 L. Ed. 287.

The State of California embodied in Article I of its Constitution, Sections 11, providing for uniform operation of laws of a general nature, and 21, providing that no citizen—or class of citizens—should be granted privileges or immunities which, upon the same terms should not be granted to all citizens, to establish that the guarantee of equal protection of the laws, Amendment 14, United States Constitution, be fully operative within the State's jurisdiction.

> A law is general and uniform in its operation, within the meaning of Article I, Section 11, if it operates uniformly upon all persons standing in the same relation to the law in respect to the privileges and immunities conferred by it or the acts it prohibits.
>
> *Hellman v. Shoulters*, 114 Cal. 136.

> By "every law of a general nature shall have a uniform operation," is meant that the Legislature shall

not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

Ex Parte Smith and Keating, 38 Cal. 702.

The rule that a deliberate and intentional discriminatory enforcement is a denial of equal protection does not apply only to enforcement of criminal statutes.

People v. Gordon, 105 Cal. App. 2d 711.

A law is not general, or *constitutional*, if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from those who stand in precisely the same relations to the subject of the law.

Cassel v. Gregori, 28 Cal. App. 2d 769.

On page 12 of the Opinion, the District Court of Appeal, State of California, has stated the primary question in the case at bar, as follows:

"It is apparent, therefore, that a statutory exception to said provision in section 25152 is that the Corporate Securities Law does apply to sales of securities by an owner of securities who is *engaged in the business* of selling, or negotiating for the sale of, securities to the public. The charges herein against the defendant were in substance, as above shown, that he unlawfully engaged in the business of buying and selling and of negotiating for the sale of securities, as defined in said section 25006 of the Corporations Code, without having secured a license so to do. The issue herein, therefore, was whether or not defendant was unlawfully engaged in the business of buying and selling or of negotiating for the sale of

> securities without having a license so to do. *Mere proof that a seller* of securities *was the owner* of the securities at the time of the sale *does not* necessarily *exempt* the seller from said statutory requirement that a person who engages in the ' siness of selling, or negotiating for the sale of, securities to the public should be licensed to do." (Emphasis added.)

The foregoing holding, of the District Court of Appeal, is directly contrary to Section 1, Amendment 14, United States Constitution, which provides in part that:

> "No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

In the instant case, petitioner's privileges and immunities have been abridged by the State's enforcement of a law, the Corporate Securities Law; petitioner is being deprived of his liberty and property without due process of law by the State's enforcement of the Corporate Securities Law; and petitioner is being denied equal protection of the laws by the State's enforcement of the Corporate Securities Law, of the State of California; insofar as its enforcement has affected petitioner in the foregoing ways, contrary to the provisions of Section 1, Amendment 14, United States Constitution, that Law is unconstitutional.

Petitioner was the unqualified owner of the stock which he sold; the evidence supports the fact of his ownership, and the State, in its Brief, pages 90-91, and 101, admitted that petitioner was the owner of the stock he sold. The

portion of the opinion, quoted above also concedes the point in stating that "It is apparent, therefore, that . . . the Corporate Securities Law does apply to the sales of securities by an owner of securities. . . ."; the "charges . . . were . . . that he unlawfully engaged in the business of buying and selling . . . securities, as defined in said section 25006 of the Corporations Code, without having secured a license so to do."

> The rights to acquire, enjoy, own and dispose of property are among the civil rights intended to be protected from discriminatory State action by the Fourteenth Amendment to the United States Constitution.
>
> *Sei Fujii v. State of California*, 38 A. C. 817.

The preceding ruling by a California court, in 1952, is but one of a long series, all based on Article I, Section 1, of the California Constitution, which provides:

> "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

The foregoing Constitutional provision was placed on the statute books in 1849 and based the California Supreme Court decision in 1857, in *Billings v. Hall*, 7 Cal. 1.

> The right of acquiring, possessing, and protecting property is one of the primary objects of government, is guaranteed by the Constitution, and *cannot be impaired by the Legislature.*

This was followed by another decision of the same court, in 1902:

> The right of property antedates all constitutions, and the individual's protection in the enjoyment of this right is one of the chief objects of society.
>
> *Stimson Mill Company, v. Braun, supra.*

In 1906, the California Supreme Court amplified the aforementioned Constitutional right in holding:

> The right of property includes the right to dispose of such property in such manner as the owner pleases, and to sell it for such price as he can obtain in fair barter.
>
> *Ex Parte Quarg*, 149 Cal. 79.

In 1915, the same court carried the Constitutional guarantee still further when, in *Roystone Co. v. Darling*, 171 Cal. 526, it held that the right of "acquiring, possessing, and protecting property" is a guarantee that includes the right to contract concerning the use, enjoyment, and disposition of property. Other decisions were handed down, in consonance with the foregoing, that:

> The Legislature cannot, under the guise of police regulations, enact laws not pertaining to the public welfare, public health, or public morals, which impose onerous and unnecessary burdens upon business and property.
>
> *Ex Parte Hayden*, 147 Cal. 649.

> A legislative body may not, under the guise of the police power, impose unnecessary and unreasonable restrictions upon the use of private property or the pursuit of useful activities.
>
> *McKay Jewelers, Inc., v. Bowron*, 19 Cal. 2d 595.

The California Supreme Court, in *Hart v. City of Beverly Hills*, 11 Cal. 2d 343 (1938), held that by judicial determination, evidenced by many legal precedents, the principle of law is THOROUGHLY ESTABLISHED that the constitutional rights of the individual to acquire and to possess property includes the right to dispose of it—ordinarily in such innocent manner as he may see fit to do—and *that no statutory restriction upon such personal liberty is permissible.*

United States v. Katz, 271 U. S. 354.

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with legislative purpose."

The California Supreme Court, in *Sutter-Yuba Investment Co. v. Waste*, 21 Cal. 2d 781, extended Justice Stone's statement further:

"In the case of *People v. Davenport*, 13 Cal. 2d 681, this court held that *the words of a statute* WILL NOT *be given their literal meaning when to do so would carry its operation beyond legislative intent and thereby make it apply to transactions not contemplated by the Legislature.*"

"This court has repeatedly held that statutes are to be interpreted in the light of reason and common sense and should not be given a construction which would lead to absurd consequences. (Cited cases.)" (Emphasis added.)

It is apparent that the California Legislature, in enacting Section 25006, Corporations Code, could not have had

any legislative intent or purpose to do what is beyond the scope of its authority under the California Constitution to do, and abrogate the individual's property rights guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution; it is furthermore apparent that, to give the words of Section 25006 their literal meaning, "would carry its operation beyond legislative intent and thereby make it apply to transactions not contemplated by the Legislature," would make agents out of principals, and brokers (as commonly defined) out of owners, a "construction which would lead to absurd consequences."

That there is a commonly-held distinction between the activities of an owner, or principal, and an agent, or broker, is attested to in numerous authorities such as the following:

On page 31, 12 C. J. S., Section 11, it is stated that even a broker:

> ". . . may sell securities *which he owns* to his customer, *in which case he does not act as a broker, but as a principal* in the sale of commodities." (Emphasis added.)

In *Williams v. Kinsey*, 74 Cal. App. 2d 583, the court made the observation:

> "That *when one deals in his own property his negotiations*, with reference to the sale or exchange thereof *do not constitute him a broker* within the meaning of the act. . . ." (Emphasis added.)

Since there is a widespread acceptance of the distinction between principal and agent, or owner and broker, the text comprising Section 25006, in specifically excluding an agent from its purview, and, with the exclusion, all that

pertains to agency, is contrary to its title, "Broker." This creates a decided inconsistency between the meaning of "broker" which is to be "construed according to the context and *the approved usage of the language*" (Code Civ. Proc., Sec. 16), and the meaning of "Broker" which the Legislature has endeavored to give it in Section 25006, making said Section decidedly vague and ambiguous.

Section 25006, Corporations Code, defines some acts which it designates as being those of a "broker," therein specifying that the term:

> ". . . includes every person, other than an agent, who, in this State, engages wholly or in part in the business of selling, offering for sale, negotiating for the sale of . . . any security issued by others . . . or of purchasing such securities with the purpose of reselling them, or offering them for sale to the public."

The wording of the section quoted, in specifying that a "broker" "includes *every person*, other than an agent," reveals that the section is intended to have a meaning broader than the commonly accepted definition found in Webster's New International Dictionary, Second Edition, unabridged:

> "Broker—One who, for a commission or fee, brings parties together and assists in negotiating contracts between them. Such contracts ordinarily cover the sale of property. . . . The broker does not, *as broker*, take possession of, or have a lien upon, the subject-matter of the negotiation. . . . He is primarily the *agent* of the party who originally *employs* him. . . ." (Emphasis added.)

An explanatory definition of "broker," in line with the foregoing, is found in 12 C. J. S. Sec. 11, p. 29, quoted as follows:

> "The primary and essential feature underlying the relation of customer and broker is that of *agency, and is ordinarily a special agency* (*Anderson v. Geo. L. Barnet Co.*, 1 CA 2d 340), and the rules of law, applicable to principal and agent generally, govern THEIR RESPECTIVE RIGHTS AND LIABILITIES." (Emphasis added.)

Morgan v. Jaudon, 40 How. Pr. (N. Y.) 378:

> "A broker is a *mere intermediate agent* negotiating between buyer and seller." (Emphasis added.)

Bouvier's Law Dictionary, Rawles 3rd Edition, carries the following definitions:

> "Brokers—Those who are engaged for others in the negotiation of contracts relative to property, *with the custody of which they have no concern.*
>
> "Stock Brokers—Those *employed* to buy and sell stocks and bonds in incorporated companies and government bonds." (Emphasis added.)

This would definitely mean that a stock broker is an *agent* for his principal.

Furthermore, on page 13 of the Opinion, the District Court of Appeal states that petitioner was also "engaged in the business" of buying and selling as follows:

> "The jury could have reasonably found from the evidence that at the time defendant agreed to sell

> Stadia stock to the various persons, mentioned in the counts of which he was convicted, he was not the owner of the stock he subsequently delivered to them; that after he had agreed to sell stock to those persons, he purchased stock from Collins and the Smith Company in order that he might make delivery of the stock he had agreed to sell; and that he was engaged in the business of buying and selling, and of negotiating for the sale of, the stock.

The record will show that petitioner did *not* buy Stadia stock *from* Collins; he bought it from a C. A. Upson, owner of the shares, through the *agency* of Collins, and what the jury could have found, and what it would have found had it been given petitioner's requested instructions pertaining thereto, is conjectural.

However, assuming, *arguendo*, had the jury found, as the Opinion states it could have found, that petitioner contracted for the sale of Stadia stock prior to his acquisition thereof, the transactions would have been no more than contracts for future delivery of stock, commonly termed "short sales". Further assuming, *arguendo*, that petitioner's contracting for future delivery of stock was evidence that he bought, negotiated for the sale of, and sold stock for his own account, it does not necessarily follow therefrom that he was "engaging in the business" of buying and selling, and of negotiating for the sale of, stock; and particularly is this so in view of the fact that there is no statutory definition as to what constitutes "engaging in business" as the term is used in Section 25006, Corporations Code, which defines a "broker". Nowhere, in the record, or in judicial or legal authority, is there any support whatsoever for the contention, in the Opinion, that petitioner "*engaged in the business*

of buying and selling, and of negotiating for the sale of the stock" because "he purchased stock from Collins and the Smith Company in order that he might make delivery of the stock he had agreed to sell".

If the individual's right to contract for the future delivery of stock, or make a "short sale", is restricted or prohibited by Section 25000, that statute is in direct contravention to Article I, Section 10, Cl. 1, United States Constitution.

The many preceding citations show that the California courts are aware of the individual's Constitutional right to contract concerning property, said right including the right to contract sales for future delivery, called "short sales" which, in *Provost et al. v. United States*, 269 U. S. 443, is given the following definition:

> "A 'short sale' is a contract for sale of shares of stock which the seller does not own, or certificates which are not within his control, so as to be available for delivery at the time when, under the rules of the exchange, delivery must be made."

The sale of stock, to be delivered in the future, is valid and lawful, as declared in *Cleves v. Jamieson*, 182 U. S. 461:

> "The generally accepted doctrine . . . as stated by Mr. Benjamin*, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the

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*Benjamin on SALES, Secs. 541-542, and Notes to 4th Am. Ed. by Bennet.

parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer . . . *Irwin v. Williar*, 110 U. S. 499.

"And the fact that at the time of making the contract for future delivery the party binding himself to sell has not the goods in his possession and has no means of obtaining them for delivery otherwise than by purchasing them after the contract is made, does not invalidate the contract.

"In *Hibblewhite v. McMorine*, 5 M&W 462: 'The fact that at the time of the sale the complainants did not own any of the stock cannot support the presumption (that it was a gaming contract), because it is perfectly valid to make such a sale, and an illegal intent accompanying the performance of a perfectly legal act cannot be presumed.'"

Respondent, on pages 90-91 of its Brief, makes a statement which brings to light another possible type of transaction, a modification of the "short sale" termed a "sale against the box":

"And there is no evidence that the appellant ever transferred the shares represented by the certificate for 9850 shares which he asserted he bought before he sold any shares of stock to the complaining witnesses."

Louis Loss, in his book, Securities Regulation (1951), page 678, quotes from Stock Exchange Practices*, regarding the "sale against the box" as follows:

"A type of sale not technically a short sale, but similar in nature, is a 'sale against the box'. In such

*Report of the Committee on Banking and Currency, S. Rep. No. 1455, 73rd Cong., 2d Sess. (1934).

> a transaction, the seller owns and possesses stock which he can deliver but which for some reason he prefers not to deliver. * * * It is contended by stock exchange authorities that a 'sale against the box' is not a short sale, since the customer need not buy the stock back but may make delivery from securities in his box. It is plain, however, that where a person initially makes a 'sale against the box' but subsequently changes his mind, there is nothing to prevent him from covering in the open market. In such case he is indistinguishable from any other short seller.'"

In *People v. Vickers*, 8 Cal. App. 2d 315, the court held:

> "Further testimony showed that no demand was ever made for the stock, and there is no showing whatsoever that Strong could not have delivered the stock. If Strong personally had and owned a block of stock in the Nevada Corporation, which he could deliver, he had a right to sell a portion of it without a permit. *People v. Pace*, 73 Cal. App. 548; *Clover v. Jackson*, 81 Cal. App. 55.

The court, in *LeBreton v. Cook* (Calif.), 40 Pac. 552, made the succinct statement that:

> "The right of an owner to sell property *prevails* no matter whether . . . the seller's interest be one in possession *or a future interest*." (Emphasis added.)

From the foregoing, together with the evidence, in the record, that the stock was delivered, by petitioner, to the complaining witnesses, it can be readily seen that petitioner intended to, and did make, delivery of the stock, that no wagering or gaming contracts were even con-

tem.plated, granting, *arguendo*, that appellant did not have the stock when he sold it, and that petitioner's stock transactions fell in either of the two catagories: "short sale" or "sale against the box". Neither type of transaction is indicative of, or determinative of, "engaging in business" as a broker, defined in Section 25006, Corporations Code; the construing of the Corporate Securities Law in a manner to permit its enforcement against petitioner by charging him with "engaging in business" as a "broker" because he sold his own stock, of which he was not the issuer or underwriter, for his own account, is, as held in *People v. Gordon, supra*, a deliberate and intentional discriminatory enforcement which denied petitioner equal protection of the laws and abridged his privileges and immunities under Amendment 14, United States Constitution.

As of the year 1925, the Corporations Code section, pertaining to the exemption of an owner's securities transactions, nevertheless endeavored to regulate an owner's transactions by specifying that the Corporate Securities Law did not apply to an owner's disposing of his own securities for his own account *provided he did not make repeated or successive sales;* that portion of the Act was determined to be unconstitutional, in *People v. Pace, supra*, because what constituted "repeated or successive sales" was vague and ambiguous.

The California Legislature, faced with the judicial determination that the phrase "repeated or successive sales" was unconstitutional, when applied to an owner's securities-transactions as a means of exercising control over them, attempted to retain control over the owner's securities transactions by devising the even more vague and ambiguous phrase "engages in business"; the phrase "en-

gages in business" is but a broader and more subtle substitute for the phrase "repeated or successive sales", and is equally unconstitutional.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298.

"Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can forshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury . . ."

Schneider v. State, supra.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preference or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to maintenance of democratic institutions. And so, when cases arise, the delicate and difficult task falls upon the courts to weigh the cir-

cumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

In Re Bell, 19 Cal. 2d 488,

"The Constitution is the bulwark of our civil liberty and it should be so construed as to protect that liberty against encroachment even under the guise of the police power. While some of its provisions have at time been emasculated by enthusiastic advocates of the police power doctrine, the Constitution still remains the fundamental law of the land and will continue to be such so long as the ideal of civil liberty is predominate in the hearts and minds of the American People."

Section 25152, as it stands today, is open to the same condemnation, of vagueness and ambiguity, in that it makes an otherwise clearly defined owner's exemption, from application of the Corporate Securities Law, subservient to Section 25006 by the opening phrase thereof: "Except as expressly provided in this division"; Section 25006 is also in the same division as Section 25152, and provides that a "broker" includes every person, other than an agent, who "engages in the business" of buying and selling securities, issued by another. Thus, under an equally vague and ambiguous phrase, "engages in business", (of which there is no statutory definition), the securities transactions of an owner, who is not the issuer or underwriter thereof and made only for his own account, the Legislature has sought to regulate and control said securities owner's transactions while ostensibly observing said owner's property rights, guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution.

CONCLUSION.

Wherefore, your petitioner prays that a Writ of Certiorari issue, under the seal of this Court, directed to the District Court of Appeal, Second Appellate District, State of California to the end that this cause may be reviewed and determined by this Court, as provided by the Statutes of the United States; and that the Judgment herein, of said District Court of Appeal, be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

JAMES H. MORRISON,
Petitioner,

By: DAVID H. CAPLOW,
Counsel for Petitioner.

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APPENDIX.

Opinion of the District Court of Appeal.

[Crim. No. 6141. Second Appellate District, Division Three. Filed February 26, 1959.]

The People of the State of California, Plaintiff and Respondent, vs. James H. Morrison, Defendant and Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County and from order denying motion for new trial. Clement D. Nye, Judge. Affirmed.

David H. Caplow for Appellant.

Edmund G. Brown, Attorney General, and Elizabeth Miller, Deputy Attorney General, for Respondent.

Defendant was accused in seven counts with violating section 26104, subdivision (a), of the Corporations Code, and he was accused in four counts with grand theft. In a jury trial, he was convicted on six counts (counts 1, 3, 5, 7, 8, and 10), and acquitted on one count, of violating said section of the Corporations Code; and he was acquitted on the grand theft counts. He appeals from the judgment and the order denying his motion for a new trial.

In count 1, defendant was accused of violating "section 26104(a)" of the Corporations Code in that about July 11, 1955, he unlawfully engaged "in the business of buying and selling, offering for sale, and negotiating for the sale of securities and purchasing securities with the purpose of re-selling them to the public as defined in Section 25006 of the Corporations Code, in that the defendant did on or about said date sell and offer for sale and cause to be sold, for value, to wit, Five Hundred

and 00/100 Dollars ($500.00), to George Neikrug, a security, to wit, shares of stock in a company known as and called Stadia Oil and Uranium Corporation, a corporation, organized under the laws of the state of Nevada, for profit, without first having applied for and secured from the Commissioner of Corporations of the State of California, a license so to do."

The other five counts on which defendant was convicted were identical with count 1, except as to dates, names of purchasers, and amounts.[1] The dates alleged in those counts were July 14, 15, 23, and 25, 1955.

Stadia Oil and Uranium Corporation was organized under the laws of Nevada on August 4, 1954. It never applied for or received a permit to sell shares of its stock in California. In 1955 defendant was a tax consultant in Beverly Hills, California. He never applied for or received a broker's license to sell securities in California.

About the dates set forth in the information, the persons named therein as purchasers mailed or delivered, to defendant in Los Angeles County, checks in the respective amounts as set forth in the information (ranging from $500 to $4,200). Thereafter defendant delivered, to the respective purchasers, certificates representing shares of stock of Stadia Oil and Uranium Corporation, which shares he had sold to them at the price of $2.00 a share. The date on some of the certificates was July

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[1]Count	Date of Purchase	Name of Purchaser	Amount
3	July 15, 1955	Dr. W. John Pangman	$2,000
5	July 14, "	Stanley L. Marlowe	4,200
7	July 25, "	Ada Bell	1,000
8	July 25, "	Anne Pratt	3,000
10	July 23, "	Taylor Holmes	1,000

20, 1955, and the date on the other certificates was July 29, 1955.[2]

Appellant states that he has never denied that he sold stock issued by Stadia. He asserts that the evidence shows that he was the owner of the stock which he sold; that as such owner he was exempt, under section 25152 of the Corporations Code, and under the due process and equal protection of the law provisions of the federal and state Constitutions, from a statutory requirement that a seller of securities should have a license in order to sell them.

George Neikrug, the purchaser referred to in count 1, testified that he is a musician; defendant had been his tax consultant since 1950, and they had had "dealings" in connection with uranium properties in Wyoming; about July 1, 1955, defendant said that, in the course of his work concerning the Wyoming properties, he performed services for persons who were making available to him some stock which was worth $5.00 a share and which was going on the market at $5.00 a share; he also said that, by reason of a mistake of a secretary, he could obtain the stock for $2.00 a share in return for the services he had performed, and that the stock would go to all the persons who were connected with the uranium

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[2]The dates of the certificates, names of owners, and number of shares were:

Date	Name	Number of Shares
July 20, 1955	George Neikrug	250
July 20, "	John Pangman	1,000
July 20, "	Stanley Marlowe	2,100
July 29, "	Ada E. Bell	500
July 29, "	Ann Pratt	1,500
July 29, "	Taylor Holmes	500

deals in Wyoming; he also said that stock in the company would cost the witness $2.00 a share, and that the stock was going to open on several stock exchanges throughout the country in 30 days at $5.00 a share; a few days after July 1 defendant told him that there was a limited amount of stock available.

Mr. Neikrug testified further that on July 11, 1955, he paid $500 to defendant for 250 shares of the Stadia stock, and several days later he received a certificate for those shares; on July 26, 1955, he paid $700 to defendant for 350 shares of the stock, and thereafter he received a certificate for those shares; on August 2, he paid $400 to defendant for 200 shares of the stock, and thereafter he received those shares; on August 26, he paid $800 to defendant for 400 shares of the stock, and thereafter he received those shares; about August 26, upon behalf of Samuel Neikrug, he paid $5,000 to defendant for 2,500 shares of the stock, and thereafter Samuel Neikrug received those shares; about August 26, upon behalf of Alexander Neiman, he paid $200 to defendant for 100 shares of the stock, and thereafter Neiman received those shares; about August 26, upon behalf of Israel Baker, he paid $2,000 to defendant for 1,000 shares of the stock, and thereafter he (witness) received those shares for Baker. The certificates of stock referred to in the above testimony of Neikrug were issued, in the names of said purchasers, by Stadia. Mr. Neikrug testified further that on October 4, 1955, he paid $2,400 to defendant for 1,200 shares of Stadia stock. A few weeks thereafter he asked the defendant why the certificates had not been delivered. Defendant said that the certificates were tied up in Salt Lake City and that he would get them. On several subsequent occasions

Neikrug made similar inquiries of defendant, and defendant made similar replies. About February, 1956, he received three certificates representing 1,200 shares of the stock. Two of those certificates had been issued in the names of defendant and Zona Bell; and one of those certificates had been issued in the name of Zona Bell.[8] Those certificates were assigned to Neikrug.

Dr. John Pangman, the purchaser referred to in count 3, testified that he is a plastic surgeon; he met defendant in January, 1955, and soon thereafter he gave checks to defendant to purchase percentage interests in uranium claims in Wyoming; about July 15, 1955, defendant told him; that on account of favors he had done for the officers of Stadia, they had made available to him a block of 40,000 shares of Stadia stock, and he could sell the stock for $2.00 a share; there were 200,000 shares of founders' stock and approximately 100,000 shares were to be sold; the stock had been cleared by the Securities and Exchange Commission and would be sold in all of

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[8]The numbers and dates of certificates, and names of owners, and number of shares, referred to in the testimony of Neikrug were as follows:

Number	Date		Owner	Number of Shares
54	July 29,	1955	George Neikrug	350
72	August 19,	"	George Neikrug	200
103	September 3,	"	George Neikrug	400
99	September 3,	"	Samuel Neikrug	2,500
104	September 3,	"	Alexander Neiman	100
102	September 3,	"	Israel Baker	1,000
88	August 19,	"	James H. Morrison and Zona G. Bell	1,000
119	September 20,	"	Zona Gale Bell	100
121	September 20,	"	Zona Gale Bell and James H. Morrison	100

the states and Canada for $5.00 a share; the stock would go on the market in about two weeks. He also testified that on July 15 he paid $2,000 to defendant for 1,000 shares of Stadia, and several days later he received a certificate for those shares.

Stanley Marlowe, the purchaser referred to in count 5, testified that he is an actor; he met defendant in June, 1955; on June 14, 1955, defendant called him by telephone and said that the Stadia company was allowing him to sell some stock to his friends for $2.00 a share; the stock was a sure thing and would come on the market on August 25 or 27 at $5.00 a share; the stock had been approved by the Securities and Exchange Commission to be sold at Chicago, Los Angeles, and Toronto. He also testified that on July 14 he paid $4,200 to defendant for 2,100 shares of Stadia, and several days later he received a certificate for those shares.

Anne Pratt, the purchaser referred to in count 8, testified that she is a schoolteacher; in July, 1955, she called defendant by telephone and asked him if she could buy into a uranium business; defendant said that he had something much better, that he could get stock for her in the Stadia corporation for $2.00 a share, that the stock would go on the market in three weeks at $5.00 a share and all the stock had been "spoken for". She testified further that, about four days later, she and Mrs. Bell had a conversation with defendant wherein he repeated the statements he had made previously, and he also said that he would have to go to Utah to get the stock. She also testified that on July 25 she paid $1,000 to defendant for 500 shares of Stadia, and several days later she received a certificate for those shares.

Ada Bell, the purchaser referred to in count 7, testified that she is a schoolteacher; she met defendant in 1954, at which time he prepared an income tax return for her; in July, 1955, she and Mrs. Pratt had a conversation with defendant regarding Stadia; on July 25 she paid $3,000 to defendant for 1,500 shares of Stadia, and several days later she received a certificate for those shares. The testimony of Mrs. Bell, regarding the statements of defendant in said conversation, was substantially the same as the testimony of Mrs. Pratt regarding defendant's statements.

Taylor Holmes, the purchaser referred to in count 10, testified that he is an actor; defendant had prepared income tax returns for him; in July, 1955, defendant said that he knew a fine way to make money quickly and he wanted Holmes in on it, that Stadia stock would go on the market on August 23, and would go to $5.00 a share.

Mr. Holmes testified further that on July 23, 1955, he paid $1,000 to defendant for 500 shares of Stadia stock, and several days later he received a certificate for those shares; on August 2, 1955, he paid $3,000 to defendant for 1,500 shares of Stadia, and thereafter he received a certificate for those shares (certificate dated August 19), on September 7, 1955, he paid $600 to defendant for 300 shares of Stadia, and thereafter he received a certificate for those shares (certificate dated September 20). The certificates referred to in the above testimony of Holmes were issued, in Holmes' name, by Stadia.

Dr. Wheelis, a physician, testified that on June 14, 1955, while he and defendant and seven other persons were at a luncheon, defendant said: that Stadia stock was available only through him at that time; he had performed some service for Stadia and could get stock at

$2.00 a share; the stock would be on the market about two weeks later at $5.00 a share; he would buy the stock at $2.00 a share and sell it to Dr. Wheelis and the others who were at the luncheon for $2.00 a share.

Dr. Wheelis testified further that on July 15, 1955, he paid $1,200 to defendant for 600 shares of Stadia stock, and thereafter he received a certificate for those shares; subsequently he purchased additional shares of Stadia stock, through the agency of another man, at $1.00 a share; thereafter he (witness) demanded that defendant return the money which he had paid to defendant for the 600 shares, and a few days later defendant paid him $1,200, and then Dr. Wheelis returned the certificate for the 600 shares to defendant.

The prosecution also introduced evidence, as follows: On July 29, 1955, defendant purchased 17,800 shares of Stadia from Austin B. Smith Brokerage Company in Salt Lake City, and in payment therefor he gave to that company a check for $17,800, which check was dated July 18, 1955 (a date which was 11 days before the purchase). Mr. Smith gave defendant a confirmation of the sale and told him that the stock could be issued in the names of any persons. Defendant gave the secretary the names of 11 persons to whom the stock was to be issued, and he designated the number of shares to be issued to each person. Some of those persons, and the number of shares designated for them, were: George Neikrug 350 shares; Ada Bell 500 shares; Anne Pratt 1,500 shares; Taylor Holmes 500 shares; and defendant 7,800 shares. On August 15, 1955, defendant purchased 4,700 shares of Stadia from said Smith company, and in payment therefor he gave to that company a check for $4,700, which check was dated July 31, 1955 (a date

which was 15 days before the purchase). Defendant gave the secretary of Stadia the names of 13 persons to whom the stock was to be issued, and he designated the number of shares to be issued to each person. Some of those persons, and the number of shares designated for them, were: George Neikrug 200 shares; and defendant or Zona Bell 1,500 shares. In August 20, 1955, defendant purchased 4,000 shares of Stadia from the Smith company, and in payment therefor he gave to that company a check for $4,000, which check was dated August 20, 1955. (The record does not show the names of the persons to whom the stock was issued. Defendant testified that about 2,000 shares were issued in his name, and he believed that he told Smith's secretary the names of one or two persons to whom the stock was to be issued.) On September 3, 1955, defendant purchased 18,200 shares of Stadia from the Smith company, and in payment therefor he gave a check for $18,200, which check was dated August 20, 1955 (a date which was 14 days before the purchase). Defendant gave the secretary of Stadia the names of 14 persons to whom the stock was to be issued, and he designated the number of shares to be issued to each person. Some of those persons, and the number of shares designated for them, were: Samuel Neikrug 2,500 shares; Israel Baker 1,000 shares; George Neikrug 400 shares; Alexander Neiman 100 shares; and defendant 8,050 shares. On September 20, 1955, defendant purchased 1,100 shares of Stadia from the Smith company, and in payment therefor he gave a check for $1,100, which check was dated September 13, 1955 (a date which was 7 days before the purchase). (The record does not show the names of the persons to whom the stock was issued.)

With reference to the above-mentioned purchases from the Smith company, defendant testified in substance the same as is above set forth with reference to those purchases.

Defendant testified further that on July 3, 1955, he met John Collins (then secretary and treasurer of Stadia) in Wyoming, and they had a discussion regarding Stadia; in reply to defendant's inquiry, Collins said that no stock of Stadia was available at that time; about July 8, 1955, Collins (who was then in Reno, Nevada) called defendant by telephone and said that he had come across a block of stock (10,000 shares) in the hands of a Nevada resident, and that 9,850 shares of the stock were available; defendant told Collins that he wanted the stock, that Collins could consider it a closed deal, and that defendant would mail a check to Collins; Collins said, "You're the owner of the stock as of now"; on that same day, defendant mailed his check to Collins, which check was payable to Stadia; at that time he did not have $9,850 in the bank on which the check was drawn, but he had made arrangements to borrow the money from a friend; the following morning, in a telephone conversation, Collins confirmed receipt of the check and said that the stock was defendant's stock and that he (Collins) would transfer the certificate to defendant as soon as possible; on July 16, when defendant was in Reno, he gave another check for $9,850 to Collins, and Collins returned the other check (for $9,850) to defendant; the check he gave to Collins on July 16 (second check) was inadvertently dated July 14 (the check was payable to Collins); subsequently he received Stadia stock certificate Number 21 for 10,000 shares which had been issued in the name of C. A. Upson; and he also received an

assignment of 9,850 shares represented by the certificate, which assignment was signed by C. A. Upson and dated July 20, 1955; a stock certificate for 9,850 shares was not issued in his name; before July 29, 1955 (the date of defendant's first purchase from the Smith company), he had sold about 7,850 shares of the stock represented by the Upson certificate.

Copies of certificate Number 21, and said assignment of 9,850 shares, and the second check for $9,850, which are referred to in defendant's testimony, were received in evidence. The spaces provided in the assignment for the name of the assignee are blank. The date on the second check, July 14, 1955, was a date which was 2 days before the date defendant allegedly gave that check to Collins. The first endorsement stamp of a bank on that check (a bank in Reno) was dated July 21, 1955, which was 5 days after defendant allegedly gave the check to Collins.

There was evidence, on behalf of defendant, that about July 20, 1955, defendant delivered certificate 21 to Stadia, and requested that the shares represented thereby be transferred to certain persons; that pursuant thereto Stadia issued 13 certificates, in the names of various persons, for a total of 9,850 shares, that about July 23 Stadia delivered those certificates to defendant. Included in those certificates there were certificates as follows: one issued in the name of George Neikrug for 250 shares; one issued in the name of John Pangman for 1,000 shares; and one issued in the name of Stanley Marlowe for 2,100 shares.

A contention of appellant, as above stated, is that he was the owner of the stock which he sold, and as such owner he was exempt from any statutory requirement that a seller of securities should have a license to sell

them. He argues that, under the provisions of section 25152 of the Corporations Code, the Corporate Securities Law does not apply to a sale of stock by a bona fide owner of the stock. Said section 25152 provides, in part: "Except as expressly provided in this division", the Corporate Securities Law does not apply to the sale of securities by a bona fide owner of the securities. Section 25700 which is in the same code division provides: "No person or company shall act as an agent or broker until it has . . . secured from the commissioner a certificate . . . authorizing it so to do." Section 25006 which is in the same code division provides: "Broker' includes every person . . . other than an agent, who . . . engages either wholly or in *part in the business of selling*, offering for sale, negotiating for the sale of . . . any security issued by others . . . *or of purchasing such securities with the purpose of reselling them*, or of offering them for sale *to the public*." (Italics added.) It thus appears that other code provisions, in the same code division where said section 25152 appears, contain an exception to the provision (in section 25152) that the Corporate Securities Law does not apply to a sale by a bona fide owner. Those other provisions were to the effect that no person shall act as a broker until he has secured a license; and a broker is a person who engages *in the business* of selling, or of negotiating for the sale of, securities to the public. It is apparent, therefore, that a statutory exception to said provision in section 25152 is that the Corporate Securities Law does apply to sale of securities by an owner of securities who is engaged *in the business* of selling, or of negotiating for the sale of, the securities to the public. The charges herein against the defendant were in substance, as above shown, that he unlawfully engaged in the business of buying and selling and of

negotiating for the sale of securities, as defined in said section 25006 of the Corporations Code, without having secured a license so to do. The issue herein, therefore, was whether or not defendant was unlawfully engaged in the business of buying and selling, or of negotiating for the sale of, securities without having a license so to do. Mere proof that a seller of securities was the owner of the securities at the time of the sale does not necessarily exempt the seller from said statutory requirement that a person who engages in the business of selling, or of negotiating for the sale of, securities to the public should be licensed so to do.

The jury could have reasonably found from the evidence that at the time defendant agreed to sell Stadia stock to the various persons, mentioned in the counts on which he was convicted, he was not the owner of the stock he subsequently delivered to them; that after he had agreed to sell stock to those persons, he purchased stock from Collins and the Smith company in order that he might make delivery of the stock he had agreed to sell; and that he was engaged in the business of buying and selling, and of negotiating for the sale of, the stock. It was established that he did not have a license. With respect to the sales to Neikrug, Pangman, and Marlowe (Counts 1, 3, and 5) on July 11, 15, and 14 respectively, the jury was not required to believe defendant's explanation to the effect: that about July 8 he told Collins that he would then buy from Collins 9,850 shares of stock; that on that day he mailed a check for $9,850 to Collins; and that Collins then said that defendant was then, at the time of the alleged conversation, owner of those shares. It was conceded by defendant that he did not have sufficient money in the bank to pay the check for $9,850 which he allegedly mailed to

Collins on July 8. That check, which he asserted was returned by Collins on July 16, was not produced in evidence. The jury could have found that his first agreement to buy the 9,850 shares from Collins was on July 16, when he gave Collins a check for $9,850, and predated it July 14; and could have found that the purchase from Collins was completed on July 20, when defendant received the assignment of 9,850 shares from Upson. In other words, the jury could have found that it was on July 20, several days after the defendant agree to sell stock to Neikrug, Pangman, and Marlowe (on July 11, 15, and 14, respectively) that defendant became owner of the stock which Stadia, at his request, delivered to him on July 23.

With respect to the sales to Bell and Pratt (counts 7 and 8) on July 25, and to the sale to Holmes (count 10) on July 23, there was evidence that on July 29 defendant purchased 17,800 shares of Stadia from the Smith company, at $1.00 a share, and on that day he gave his predated check (dated July 18) in payment therefor. It was from those shares that Stadia, on July 29, at the request of defendant, issued certificates of stock to Bell, Pratt, and Holmes for the shares they had purchased from defendant on July 25 and 23. It appears that on July 29, several days after defendant agreed to sell stock to those purchasers (on July 25 and 23), he purchased stock in order that he might make delivery of the stock he had agreed to sell. The jury could have found he was not the owner of the stock when he agreed to sell it to those purchasers; and could have found that he predated his check (July 18) in order to make it appear that he purchased the stock before he agreed to sell it. Even if it be assumed that defendant owned the stock for a brief period pre-

ceding the delivery of it to the various purchasers, the jury could reasonably have found that he was engaged in the business of buying and selling, and of negotiating for the sale of, the stock.

As above stated, a further contention of appellant is to the effect that he, as owner of the securities involved herein, was exempt, under the due process and equal protection of the law provisions of the federal and state Constitutions, from a statutory requirement that a seller of securities should have a license in order to sell them. In People v. Woolsey, 13 Cal. App. 2d 54 [56 P. 2d 557], the defendant contended that the Corporate Securities Act was unconstitutional insofar as it purported to regulate the sale of securities by him, as owner of the securities. It was held therein that his contention was not sustainable. In that case it was said, at page 57: "We see no reason to exempt one such as appellant, engaged in the buying and selling of securities as a 'business,' from the necessity of securing a broker's license and submitting to the reasonable regulations of the act. The public welfare is directly involved, the provision complained of is not discriminatory or unreasonable, and the fact that appellant is the owner of the securities bought and sold for the brief interval that they are in his possession presents no cogent reason why the act is inapplicable in his case. To hold otherwise would be to defeat the enforcement of the act and to prevent the safeguarding of the public designed by this legislation." The statutory requirement, involved herein, to the effect that a person who engages in the business of buying and selling, or of negotiating for the sale of, securities should have a license so to do, is not unconstitutional as applied to appellant in the matter of his said transactions involving Stadia stock.

Appellant also contends (1) that the Corporate Securities Law violates the constitutional right of due process of law in that it is vague and uncertain; and (2) that it violates the constitutional right of free speech in that it confers arbitrary powers on the Commissioner of Corporations. This contention is not sustainable. Similar contentions were made in People v. Sears, 138 Cal. App. 2d 773 [292 P. 2d 663.] In that case it was said, at page 793: "Appellant's claim that the statute is vague and indefinite and for that reason does not state a public offense is untenable. The language of the Corporate Securities Law provides an adequate warning as to what conduct comes within its prohibition." It was said further in that case, at Pages 791-792: "In answer to appellant's challenge that the act restrains the right of free speech in violation of the First Amendment to the Constitution of the United States, which is protected by the Fourteenth Amendment against state action, in that it confers plenary and arbitrary powers upon the Commissioner of Corporations, and forbids a person to deal with his property as he chooses, we might quote the following observation of the Supreme Court of the United States relative to the purposes of legislation of this character and of the evils it is designed to correct: . . ." (The quotation there referred to is in Hall v. Geiger-Jones Co., 242 U. S. 539, 550 [37 S. Ct. 217, 61 L. Ed. 480].)

Appellant contends that the information was insufficient in that it did not apprise him of the charges against him in such a manner as to enable him to prepare his defense and to protect him against another prosecution for the same offense. An information is sufficient if it charges the offense "in any words sufficient to give the accused notice of the offense of which he is accused." (Pen. Code § 952.) "Notice of the particular circum-

stances of the offense is given not by detailed pleading but by the transcript of the evidence before the committing magistrate (or the grand jury); defendant is entitled to such transcript under section 870 (or section 925) of the Penal Code." (People v. Roberts, 40 Cal. 2d 483, 486 [254 P. 2d 501].) In substance, each count of the information on which defendant was convicted charged him with selling stock, issued by Stadia, without having obtained a broker's license. This contention is not sustainable.

Appellant contends that the court erred in not receiving in evidence certified copies of the pleadings and judgment in a civil action commenced in Utah by five of the complaining witnesses, and others, against Stadia, appellant, John T. Collins, and others, to rescind the purchase of Stadia stock and to recover the amounts paid for the stock. When defendant offered the pleadings in evidence, the prosecution objected to the offer on the ground that the copies were immaterial and that the parties and issues were not the same. The objection was sustained. Appellant argues that the pleadings were admissible to show: interest, bias and motive on the part of some of the prosecution witnesses herein; that allegations of that complaint were inconsistent with the testimony of prosecution witnesses in the present case; and that the issues of ownership of the stock and misrepresentation in the sales of the stock had been adjudicated in that action. During cross-examination of some of the complaining witnesses, defendant's counsel elicited information that the complaining witnesses herein had commenced the Utah action, and elicited information as to the nature of that action. Appellant has not specified the allegations of that complaint, which he claims are inconsistent with the testi-

mony of prosecution witnesses. The parties to the Utah action, *i.e.*, the prosecution witnesses herein and others, as plaintiffs therein, and appellant and others, as defendants therein, were not the same as the parties to the present case, *i.e.*, the People of the State of California and the appellant. The court did not err in sustaining the objection.

Appellant contends that the court erred in refusing to instruct the jury, as requested by him to the effect that testimony by deposition is entitled to the same consideration as testimony by a witness in court. The only witness whose testimony was given by deposition was Austin B. Smith, a witness for the prosecution, who testified regarding the sales of Stadia shares by the Smith company. Appellant argues that the failure to give the requested instruction minimized the value of Smith's testimony that appellant bought and paid for the stock which appellant sold to the complaining witnesses. The prosecution did not contend that appellant did not pay for the stock he bought from the Smith company. The prosecution introduced in evidence: (1) copies of the documents in which the Smith company confirmed the sales of the stock to appellant; and (2) copies of appellant's checks to the Smith company. The court did not err in refusing to give said instruction.

Appellant asserts that the court erred in refusing to give 11 other instructions which were requested by him. In his opening brief he does not set forth those instructions or cite the pages where such instructions are in the record. In that brief he states that each of the instructions touched on the issues raised by the People, and that the instructions "had to do" with "the following facts and law" developed by the prosecution evidence. The

"facts and law", so referred to, were briefly set forth by a general reference to the subject matter of the proposed instructions. Those references were as follows: Legality of a "short sale". Presumptions—that private transactions have been fair; the law has been obeyed; ordinary course of business is followed; and a person is owner by exercising acts of ownership. A valid contract may be made by telephone. An owner of stock may make sales without a permit or without having actual possession of a certificate of ownership. Specific intent, when an element of an offense, must be proved. One's right to dispose of his property is guaranteed by the state Constitution.

Appellant's argument with reference to such refused instructions is that by reason of the court's refusal to give those instructions he was denied due process of law. In view of such general references and general argument as to those instructions, it is not necessary to discuss the instructions in detail. As to the presumptions referred to, it appears that the given instruction on the subject of reasonable doubt was adequate. Furthermore, appellant testified with reference to his actions and statements in connection with the transactions. Specific intent is not a necessary element of the offense, charged herein, of violating the Corporate Securities Act. (See People v. Murphy, 17 Cal. App. 2d 575 [62 P. 2d 592].) As to the other refused instructions, so referred to, it is sufficient to say that they are covered by instructions which were given. The court did not err in refusing to give said instructions.

Appellant contends that the judge erred in refusing to discuss with appellant's counsel the instructions submitted by him. The judge was not required to discuss the instructions, and he did not err in refusing to discuss them.

Appellant contends further that the court erred in instructing the jury, as requested by the prosecution, that the jury should view with caution any evidence that purports to relate an oral admission of the defendant. Appellant argues that there was no evidence of an oral admission by him. Officer Gibbons, an investigator for the district attorney, testified that appellant said that he was selling the stock for $2.00 a share and buying it in Salt Lake City for $1.00 a share; the checks to the Smith company were in payment for Stadia stock; the confirmation slips from the Smith company were receipts showing that the sales had been made; he wrote the names of persons, and the number of shares to be issued, on the lists which he gave to the secretary of Stadia. The court did not err in giving the instruction.

Appellant also contends that it was error to give the following instruction: "The Corporate Securities Law of this state provides that no person shall act as an agent or broker in the sale of, offering for sale, or negotiating for the sale of, or in taking subscriptions for, any security until such person shall have secured from the Commissioner of Corporations of the State of California a certificate authorizing him so to do, and unless that certificate then is in force. A violation of that law is a criminal offense." Appellant argues that this instruction might cause the jury to believe that if a person sells his own stock, without having obtained a permit, he has committed an offense; and it told the jury that the defendant was acting as a broker or agent in selling the Stadia stock. The instruction included some of the provisions of sections 25700, 25006, and 26104, subdivision (a), of the Corporations Code. As stated in other given instructions, no instruction was to be considered as a single instruc-

tion, but all instructions were to be considered together, and each instruction was to be considered in the light of all the other instructions. A given instruction defined the word "Broker", and such definition included a statement to the effect "Broker" included a person who engages *in the business* of selling or of negotiating for the sale of securities. The court did not err in giving said above quoted instruction.

Appellant also contends that it was error to give the following instruction: "Every officer, agent, or employee of any company, and every other person who knowingly authorizes, directs, or aids in the issue or sale of, or who issues or executes or sells or causes or assists in causing to be issued, executed, or sold, any security the issuance, execution, or sale of which has not been authorized by a permit from the Commissioner of Corporations of the State of California then, in effect, is guilty of a public offense. The law which defines this offense is known as the Corporate Securities Law." Appellant argues that this instruction told the jury that he directed or aided in the issue or sale of a security, or that he sold a security, without first obtaining a permit; that the instruction deprived the jury of its right to determine questions of fact; that the instruction was incomplete in that it did not include a provision that if the jury found from the evidence that defendant sold his own stock to the complaining witnesses, he was exempt from prosecution; that the instruction was incomplete in that it did not incorporate the language of section 25152 of the Corporations Code; and that the instruction was prejudicial for the reason that it pertains to section 26104 of the Corporations Code; whereas appellant was charged with violation of section 26104, subdivision (a), of that code. That instruction in-

cluded provisions of section 26104 of the Corporations Code including provisions of subdivision (a) of that section. It is to be noted that the word "permit" (rather than the word "license" was used in the instruction. An instruction, given at the request of appellant, stated circumstances under which the Corporate Securities Law was not applicable to an owner. That instruction included the words of said section 25152, except the beginning words of that section which are: "Except as expressly provided in this division." Said instruction was as follows: "The Corporate Security Law does not apply to the sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of the securities, disposes of his own property for his own account, and the sale is not made directly or indirectly for the benefit of the issuer or an underwriter of the security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the Corporate Securities Law." As hereinabove indicated, the jury was also instructed to the effect a person who engages in the business of selling securities is required to have a broker's license. Also as above stated, there was an instruction to the effect that all the instructions were to be considered together. The defendant was charged with engaging in the business of selling securities without having a license so to do. The use of the word "permit" in the instruction, instead of the word "license," was not prejudicial. The court did not err prejudicially in giving said above quoted instruction.

Appellant contends that the deputy district attorney was guilty of prejudicial misconduct in asking appellant, on cross-examination, the following questions: (1) "And

the reason you did that, sir, [repurchased the stock appellant sold to Dr. Wheelis] is because you knew that you had swindled Dr. Wheelis, isn't that right?" (2) "You knew you had cheated Dr. Wheelis, is that right?" (3) "As a matter of accommodation you cheated Mr. Neikrug out of $2,400; is that right?" (4) "It [accepting $2,400 from Mr. Neikrug] was like taking candy from a baby, wasn't it?" Apparently, appellant's objection to those questions related principally to the words "swindled" and "cheated." Appellant was charged with the theft of $1,200 from Dr. Wheelis; and with theft of $2,400 from Mr. Neikrug. Those charges were based on alleged fraudulent representations. Preceding the question in which the word "accommodation" was used, appellant had said that he accommodated various persons by selling stock to them. The asking of those questions did not constitute misconduct.

Appellant also contends that the deputy district attorney was guilty of misconduct by reason of statements made in his argument to the jury. Some of those statements are as follows: "Are you going to believe Mr. Morrison who would lie to you to save himself in any respect or would you believe Mr. Gibbons. Now, when your look at that evidence in its proper perspective, you will see, ladies and gentlemen, that this was completely a figment of the defendant's imagination, this conversation. You see all throughout the trial, Counsel had been asking all of these witnesses as to the result of that trial up in Salt Lake City; and throughout the trial the Judge has been excluding that evidence as being immaterial. So now he has his last witness on the stand. This is his last chance to get it in before you as to what that verdict was up there. So he has Mr. Morrison make a portion

of the conversation that never happened, because that's the only way you people—MR. CAPLOW: If the court please, I object to that slur against Defendant's counsel, your Honor. THE COURT: It's argument, Mr. Caplow. Counsel is entitled to discuss the credibility of the witnesses. The objection is overruled. MR. STOVITZ: I am sorry if I intimated that it was Counsel that did it, because you see sometimes when you do have an advocate working with a particular side, that advocate does join forces and becomes an ally of the defendant or the plaintiff as the case may be. For instance in this case Mr. Morrison made believe that he is being persecuted, and he made believe that all of these actions that these people have taken, trying to recover their just money, as persecution. And so his attorney, his advocate, comes out and tells you those things that are written in the defendant's mind."

The statements of the deputy were made in commenting on the credibility of appellant and Mr. Gibbons (investigator for the district attorney) with respect to a telephone conversation between them. Appellant had testified that he told Mr. Gibbons that in an action brought in Utah, by the complaining witnesses in the present case, it had been adjudged that he was the owner of the stock, he had not violated the Corporate Securities Act, and he was "free" from fraud. Mr. Gibbons had testified that they did not discuss the outcome of the Utah action, and appellant did not say that he had recovered judgment in that action. Prior to that testimony, appellant had on numerous occasions offered in evidence the pleadings and judgment in the Utah action, and objections thereto had been sustained. The deputy in referring to appellant's counsel, in connection with appellant's testimony about the

Utah case, was referring to questions, which apparently afforded appellant an opportunity to tell about the Utah case. The statements of the deputy did not constitute misconduct.

Appellant asserts further that the deputy district attorney was guilty of misconduct by reason of a statement made by him during cross-examination of appellant. That statement is the last two sentences of the following quotation: "Q. [By deputy district attorney] Where is the record to show that that stock was in your name, Mr. Morrison? Mr. Caplow [attorney for defendant]: That's objected to. Counsel knows where the records are. They're up in Salt Lake City. Mr. Stovitz [deputy]: I know that not to be a fact, Mr. Caplow. I know that there are no records to show that 17,800 shares of stock was in this witness' name." It thus appears that the exchange of comments between the attorneys, regarding the location of the records, was initiated by counsel for appellant. He charged that the deputy knew where the records were, and then he declared that they were in Salt Lake City. Thereupon, the deputy denied the charge, and then asserted his view regarding the records. Under such circumstances, the statements of the deputy did not constitute misconduct.

Other contentions of appellant that the deputy was guilty of misconduct do not merit discussion. The deputy was not guilty of misconduct.

Appellant contends that the trial judge was guilty of misconduct in that (1) he overruled several objections of appellant to evidence offered by the prosecution; (2) he erred in instructing the jury; and (3) he made statements in the presence of the jury which prevented appellant from having a fair trial. He has not referred specifi-

cally to any such alleged statement of the judge. This contention is wholly without merit.

The judgment and the order denying the motion for a new trial are affirmed.

WOOD, *J.*

I concur.

VALLÉE, *J.*

I concur in the judgment.

SHINN, *P. J.*

Statutes.

United States Code—

Title 28, Section 1257, Subsection (3):

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> By Writ of Certiorari . . . where the validity of a statute is drawn in question on the ground of its being repugnant to the Constitution, treaties of laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

United States Constitution—

Article I, Section 10, 1:

> No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article IV, Section 1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

Amendment 14, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law that shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution—

Article I, Section 1:

> All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

California Constitution—

Article I, Section 11:

> All laws of a general nature shall have a uniform operation.

Article I, Section 21:

> No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

Corporations Code, State of California—

Section 25006:

(a) "Broker" includes every person or company, other than an agent, who, in this State, engages either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in, any security issued by others, including all securities of the classes listed in Section 25100, or of underwriting any issue of such securities or of purchasing such securities with the purposes of reselling them, or of offering them for sale to the public.

Section 25009:

(a) "Sale" or "sell" includes every disposition, or attempt to dispose, of a security or interest in a security for value.

"Sale" or "sell" includes all of the following, whether done directly or by an agent, circular letter, advertisement, or otherwise: An offer to sell; an attempt to sell; a solicitation of a sale; an option of sale; a contract of sale; a taking of subscription; an exchange; any change in the rights, preferences, or restrictions on outstanding securities.

Section 25152:

Except as expressly provided in this division, the Corporate Securities Law does not apply to the sale of securities when (a) made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of the securities, disposes of his own property for his own account, and (b) the sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of the security, or for the direct or indirect promotion of any scheme or

enterprise with the intent of violating or evading any provision of the Corporate Securities Law.

Section 25700:

No person shall act as a broker until it has first applied for and secured from the Commissioner a certificate, then in effect, authorizing it so to do.

Section 25706:

The commissioner shall issue the broker's or the agent's certificate applied for if, from his examination, he is satisfied that all of the following facts exist:

(a) The applicant and its officers or members, if any, are of good business reputation.

(b) The applicant has sufficient financial responsibility to carry out the obligation incident to its operations as such broker.

(c) The sale of the securities proposed to be sold by it and the manner or method of sale would not be unfair, unjust or inequitable to the purchasers of the securities.

(d) Neither the applicant nor its officers or members have violated any of the provisions of the Corporate Securities Law or of Chapter 220 of the Statutes of 1923 (sic), or of Division 4 of this title.

(e) Neither the applicant nor its officers or members have engaged or are about to engage in any fraudulent transaction.

Otherwise, the commissioner shall refuse the certificate and deny the application, and notify the applicant of his decision. However, if the only ground for denial falls under subdivision (d) or (e) of this section the commissioner may in his discretion, waive such ground for denial and issue a certificate to the

applicant if the commissioner is satisfied that in the particular case the application of either subdivision is purely technical and does not substantially affect applicant's honesty and integrity, and that the inability of applicant to meet either of these requirements will in no way interfere with the proper performance by the applicant of his duties as a broker or agent, as the case may be.

Section 26104:

Every officer, agent, or employee of any company and every other person who does any of the following acts is guilty of a public offense punishable by imprisonment in a State prison not exceeding five years, or in a County jail not exceeding two years, or by a fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment.

Section 26104(a):

Knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State.

Rules on Appeal, State of California

Rule 24—*Decision of reviewing Court*

(a) (*When Decisions Become Final*) All decisions of the reviewing courts shall be filed with the clerk.

A decision of the Supreme Court becomes final 30 days after filing unless a shorter time is ordered prior to the expiration of said 30-day period. A decision of

a District Court of Appeal becomes final as to that court 30 days after filing, except that a denial without opinion of a petition for a writ within its own original jurisdiction without issuance of an alternate writ or order to show cause becomes final as to that court immediately after filing. When a decision of a District Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

Rule 27—*Rehearing in Court Rendering Decision*

(b) (*Time For Filing Petition*) A party seeking a rehearing either in the District Court of Appeal or in the Supreme Court, or a hearing by the Supreme Court in bank after a decision in department, must serve and file a petition thereof within 15 days after the filing of the decision. The same number of copies shall be filed as is required by Rule 16.

Rule 28—*Hearing in Supreme Court*

(b) A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the District Court of Appeal becomes final as to that court. An original and 17 copies of a printed petition or an original and 10 copies of a typewritten petition shall be filed, with proof of the delivery of 3 copies of a printed petition or one copy of a typewritten petition to the clerk of the District Court of Appeal which rendered the decision. When

such copies are delivered to the clerk of the District Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the proper District Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

(c) (*Determination of Petition*) A hearing in the Supreme Court, after decision in the District Court of Appeal, may be granted by an order, signed by at least 4 justices assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the petition for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect.

Penal Code, State of California
Section 952:

"In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."